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United States 1332

# Circuit Court of Appeals

For the Ninth Circuit.

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PAUL HARBAUGH,

Appellant,

vs.

JOSEPH F. DWYER,

Appellee.

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## Transcript of Record.

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Upon Appeal from the United States District Court for  
the District of Oregon.

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**FILED**

JAN 4 - 1923

**F. D. MONCKTON,**  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

T. J. GEISLER, Henry Building, Portland, Oregon,

For the Appellant.

ROBERTS & SKEEL, Alaska Building, Seattle, Washington, and BARNETT H. GOLDSTEIN, Wilcox Building, Portland, Oregon,

For the Appellee.

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In the District Court of the United States for the  
District of Oregon.

No. 8369.

JOSEPH F. DWYER,

Plaintiff,

vs.

I. HOLSMAN, I. HOLSMAN & CO., JOHN DOE  
RUBENSTEIN, PAUL HARBAUGH,  
BEN LEVIN, JANE DOE SULLIVAN,  
GENERAL NOVELTY CO., JOHN DOE,  
RICHARD ROE and ROBERT ROE,

Defendants.

**Citation on Appeal (Original).**

United States of America,

District of Oregon,—ss.

To Joseph F. Dwyer, Plaintiff, GREETING:

WHEREAS, Paul Harbaugh, one of the above-named defendants, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the Dis-

trict Court of the United States for the District of Oregon, in your favor, and has given the security required by law.

You are, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand at Portland, in said District, this 12th day of August, 1922.

CHAS. E. WOLVERTON,

Judge.

Due and timely service of the above Citation is hereby admitted.

E. L. SKEEL,

ROBERTS & SKEEL,

Alaska Bldg., Seattle, Wash.,

B. H. GOLDSTEIN,

Of Attorneys for Plaintiff.

Dated: Seattle, Washington, Aug. 14, 1922. [1\*]

[Endorsed]: No. 8369. 25-288. In the District Court of the United States for the District of Oregon. Joseph F. Dwyer, Plaintiff, vs. I. Holsman, I. Holsman & Co., John Doe Rubenstein, Paul Harbaugh, Ben Levin, Jane Doe Sullivan, General Novelty Co., John Doe, Richard Roe and Robert

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\*Page-number appearing at foot of page of original Certified Transcript of Record.

Roe, Defendants. Citation on Appeal. U. S. District Court, District of Oregon. Filed Aug. 24th, 1922. G. H. Marsh, Clerk.

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In the District Court of the United States for the  
District of Oregon.

March Term, 1919.

BE IT REMEMBERED that on the 22d day of March, 1919, there was duly filed in the District Court of the United States for the District of Oregon a bill of complaint, in words and figures as follows, to wit: [2]

In the District Court of the United States for the  
District of Oregon.

No. 8369.

JOSEPH F. DWYER,

Plaintiff,

vs.

I. HOLSMAN, I. HOLSMAN & CO., JOHN DOE  
RUBENSTEIN, PAUL HARBAUGH,  
BEN LEVIN, JANE DOE SULLIVAN,  
GENERAL NOVELTY CO., JOHN DOE,  
and RICHARD ROE,

Defendants.



**Bill of Complaint.**

To the Honorable Judges of the District Court of  
the United States, in and for the District of  
Oregon, Ninth District:

The complainant alleges:

**I.**

That this suit is brought under the Patent Laws of the United States for infringement of United States letters patent number 1,268,222, issued June 4, 1918, and that the amount in controversy, exclusive of interest and cost, exceeds the sum or value of Three Thousand (\$3,000.00) Dollars.

**II.**

That plaintiff Joseph F. Dwyer is a resident of Seattle, King County, Washington; that defendants I. Holsman, I. Holsman & Co., John Doe Rubenstein, Paul Harbaugh, Ben Levin, Jane Doe Sullivan, John Doe, Richard Roe and Robert Roe, are residents of Portland, Multnomah County, Oregon; that General Novelty Co., complainant is informed and believes, is a copartnership, composed of the other defendants herein named.

**III.**

That Joseph F. Dwyer, being within the meaning of the statutes of the United States, the first, sole, true and original inventor of new and useful improvements in Ticket Dispensing Machines not known or used [3] before his invention or discovery thereof, did, prior to June 4, 1918, duly make and file an application in writing with the Commissioner of Patents of the United States for



letters patent upon said invention and improvements, and that subsequently, on June 4, 1918, letters patent of the United States number 1,268,222, were duly issued in pursuance to said application for said invention or improvements, whereby there was secured to said Joseph F. Dwyer, his heirs and assigns, for the full term of seventeen years, the full and exclusive right, to make, use and sell the said invention and improvement.

#### IV.

That the invention of said letters patent is of great value and importance, that plaintiff has caused great quantities of said Ticket Dispensers to be manufactured and put in use and has caused the date of said letters patent, together with the word "Patented" to be affixed with such Ticket Dispensers as have been manufactured by him or under his authority. That the said inventions are of great use and benefit and advantage to the public and the public has generally accepted and acquiesced in the plaintiff's exclusive rights thereto, and that except for the infringement herein complained of, and others of like character, the plaintiff would still be in the undisturbed possession, use and enjoyment of the exclusive rights and privileges secured to the plaintiff by said letters patent, and in receipt of all the gains and profits thereof.

#### V.

That the infringement hereinafter referred to by defendants and each of them, is depriving plaintiff of gains and profits, to which he is entitled under said letters patent, and said infringement is

an immediate and continuing injury to plaintiff and is a perpetual encouragement and inducement to others to infringe, and if said infringement is not enjoined as hereinafter prayed for, it will result in further loss and damage and irreparable injury to the plaintiff. [4]

## VI.

Plaintiff further alleges that its products have at all times been manufactured with a view to meet the wants of the trade and that by means of the care and fidelity with which plaintiff has conducted his business and the manufacture of its products, the same have acquired a name and reputation in and with the trade throughout the United States and particularly within the States of Washington, Oregon, California, Montana and Idaho, and large quantities of the same are constantly used and are required from the plaintiff to supply the regular demand.

## VII.

That for a period of more than eighteen months last past, the plaintiff has used a Ticket Dispensing Machine for selling collar buttons and other merchandise, and has used and established together with and in connection therewith a Ticket Dispensing Machine together with a display-board, having placed thereon other merchandise, and was first within the territory named to use said Ticket Dispensing Machine, and through a period of more than eighteen months firmly established the same in connection with his said business, and that during said period and prior to the wrongful acts of the

defendants as hereinafter set forth, the said Ticket Vending Machine and display-board had acquired a signification in the trade of the plaintiff; and that the plaintiff being the first person in the States of Washington and Oregon to use said method of advertising and promoting this business, and to use the said Ticket Vending Machine continuously and exclusively through the period of eighteen months prior to the wrongful acts of defendants hereinafter set forth; and during said entire period of eighteen months, the plaintiff has used said Ticket Vending Machine and display-board in all its business transactions, and plaintiff has expended large sums of money, to wit: the sum of Ten Thousand (\$10,000.00) Dollars in advertising and establishing the same in all the territory hereinafter named.

#### VIII.

Plaintiff further alleges that the defendants, having at all [5] times full knowledge of the above and foregoing facts, have wrongfully and unlawfully counterfeited and imitated said Ticket Dispensing Machine and display-boards for merchandise and is continuing to counterfeit and imitate said Ticket Dispensing Machine and Display-boards for merchandise unless enjoined and restrained by order of this Honorable Court.

#### IX.

That the wrongful and unlawful and unfair acts of the defendants as set forth in the above and foregoing paragraphs are herewith set forth with more particularity, and the more particular and especial acts of which the defendants have been guilty, and

of which they are still guilty, and of which they will continue to be guilty unless restrained and enjoined by this Honorable Court, are as follows:

A. Unfair, fraudulent and unlawful use of Ticket Vending Machines for selling Collar Buttons and other merchandise.

B. Unfair, fraudulent and unlawful use of Display-boards upon which merchandise is displayed.

C. Unfair, fraudulent and unlawful methods of procuring business.

D. That the purpose, intent and effect of the acts of defendant in the premises as above set forth were to appropriate and unlawfully infringe upon plaintiff's rights, and to cause the public to be confused and deceived into purchasing the products of defendants upon the strength of the popularity and reputation of plaintiff's products; and that the public, by reason of said unlawful acts and infringement, has been deceived and confused, giving to defendants an unfair advantage, and constituting an unfair competition and great damage to plaintiff thereby.

## X.

The plaintiff further shows, as he is informed and believes, that the said defendants herein named well knowing all the facts hereinbefore set forth, having been duly and timely notified of the unlawful [6] acts aforesaid, are now constructing, selling and using Ticket Dispensing Machines substantially the same in construction and operation as in the said letters patent mentioned, and that notwithstanding the plaintiff has so notified the de-

fendants, they refuse to cease their wrongful acts, and have continued the same for a period of several months, and the plaintiff has been greatly injured and damaged thereby, and that all of said acts of said defendants are contrary to equity and good conscience and are a manifest wrong, injury and damage to the plaintiff, and that plaintiff has no adequate remedy in law and no speedy and adequate remedy and no remedy at all except through a court of equity.

### XI.

That so it is, may it please your Honors, that the said defendants, as plaintiff is informed and believes, without license of plaintiff, against his will, and in violation of his rights have made, sold, and used, and intend to continue still to make, sell and use the improvement within the District of Oregon and elsewhere in the United States, and refuse to desist from the future infringement of said recited letters patent, all of which acts and doings are in violation of the exclusive rights and privileges so as aforesaid vested in plaintiff and by virtue of said recited letters patent number 1,268,222, and are contrary to equity and good conscience, and tend to the manifest injury of plaintiff in the premises.

### XII.

That in cause number 8251 of the above-entitled cause, in the case of Joseph F. Dwyer vs. Enloe et al., the above-described patent was in issue and was the subject of adjudication in said cause, and the defendants therein were enjoined from making,



using and selling Ticket Dispensing Machines embodying said invention, and plaintiff was awarded damages against said defendants.

### XIII.

That plaintiff is informed and believes that the employees of said Enloe, defendant in said cause number 8251, well knowing of the [7] violation of the rights of plaintiff, are conspiring to join with the defendants herein named and encouraging the infringement of said patent. That plaintiff prays the right to add additional defendants, including the employees of defendants as their names become known.

#### WHEREFORE, PLAINTIFF PRAYS:

1. That the defendants be required to answer this complaint, but not under oath, an answer under oath being expressly waived.

2. That a permanent injunction and also a preliminary injunction pending this suit be issued, restraining the defendants, their servants, agents and employees from indirectly or directly making or causing to be made, using or causing to be used, selling or causing to be sold, or threatening to make, use, or sell, any devices, structures or appliances employing or embodying the invention described in said letters patent number 1,268,222, and from infringing upon or contributing to the infringement of said letters patent in any way whatsoever.

3. For an accounting of profits, gains and advantages and an assessment of damages, and that any damages allowed may be tripled, and for a

decree directing the payment of said gains, profits, advantages and damages to the plaintiff.

4. For costs and disbursements of this action, and for such other, further and different relief as the proceedings of the case may require.

JOSEPH F. DWYER,  
Plaintiff.

Verification. [8]

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(Title.)

**Order Granting Preliminary Injunction.**

**Order Granting Injunction Pending Suit.**

THIS MATTER having come on for hearing this 27th day of March before the Honorable Charles E. Wolverton, District Judge of the above-entitled court; the plaintiff being present in person and represented by his attorneys, Roberts & Skeel, of Seattle, Washington, and defendants, Holsman and Harbaugh, appearing in person, and all of the defendants being represented by their attorneys, Joseph L. Atkins and Otto J. Kraemer, and the affidavits heretofore served having been introduced in evidence and other evidence having been introduced by the respective parties, and argument of counsel heard, and the Court being fully advised in the premises,

**IT IS NOW HEREBY ORDERED:**

(1) That upon this hearing for preliminary injunction there was introduced in evidence, by consent of the parties, a certain Ticket Dispensing

Machine, now in the custody of the Clerk of the Court, which has been made and used by defendant, General Novelty Co., and it appears to the Court that said Ticket Dispensing Machine infringes upon U. S. letters patent No. 1,268,222, to Joseph F. Dwyer.

(2) That the said defendant, General Novelty Co., its members, owners, copartners, officers, agents and employees are hereby restrained and enjoined, pending this suit or until further order of the Court, from making, constructing, using or selling, or causing to be made, constructed, used or sold, directly or indirectly, any Ticket Dispensing Machine which employees or embodies the structure defined in the claims of plaintiff's United States letters patent No. 1,268,222; this order specifically includes any device similar to the defendants' device now in the custody of the Court.

(3) This order shall not be effective until plaintiff shall furnish a surety bond in the sum of Ten Thousand (\$10,000) Dollars, or in lieu thereof, shall deposit with the Clerk of the Court, United States Liberty Bonds of the par value of Ten Thousand (\$10,000) Dollars to secure the payment of any damage which may be awarded to defendants, if [9] upon final adjudication it shall appear that defendants do not infringe the patents in suit.

(4) Plaintiff's surety bond in the sum of Twenty-five Hundred (\$2500.00) Dollars, filed herein at the time of the temporary restraining order is hereby discharged.



Done in open court this 27th day of March, 1919.

CHAS. E. WOLVERTON,  
District Judge.

In compliance with said order of March 27, 1919, plaintiff deposited with the Clerk of the said United States District Court, United States Liberty Bonds in the sum of Ten Thousand Dollars (\$10,000.00).

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(Title.)

**Answer.**

Come now the defendants, I. Holsman doing business under the name I. Holsman & Co., Lew Rubenstein, Paul Harbaugh, doing business under the name General Novelty Co., Ben Levin and Winnie Sullivan, and in answer to the bill of complaint:

I.

Admit that this suit is brought under the patent laws of the United States, but deny that the matter in controversy in this suit has any value whatsoever.

II.

Admit that the defendants are severally resident of Portland, County of Multnomah, State of Oregon.

Deny that the general Novelty Co. is a copartnership, and to the contrary allege that said name is merely that under which said defendant Paul Harbaugh does business, and that none of the other defendants have any interest in such business whatsoever, and said defendants, Lew Rubenstein,

Ben Levin and Winnie Sullivan are mere employees of said defendant, Paul Harbaugh. [10]

### III.

Deny that Joseph F. Dwyer within the meaning of the statutes of the United States or otherwise, or at all, was the first, or sole, or true, or original inventor of any new, or useful improvement in Ticket Dispensing Machine, or not known or used before his alleged invention of discovery thereof.

That defendants are without knowledge as to whether said Dwyer on June 4, 1918, or at any time did duly make, or file an application in writing with the Commissioner of Patents of the United States for letters patent upon said alleged invention or improvement.

Defendants further deny that on June 4, 1918, or at any time, letters patent of the United States were duly issued for said alleged invention or improvement, or that thereby there was secured to said Dwyer, or his heirs or assigns, or he or they have, the full, or any, exclusive right to make, or use, or sell the said alleged invention or improvement.

### IV.

Deny that any invention whatsoever is disclosed by said alleged letters patent, or that the device described in said alleged letters patent is of any value or importance.

Defendants are without knowledge as to whether the plaintiff has caused great quantities of said Ticket Dispenses to be manufactured, or put in use.

That defendants are without knowledge also as to

whether plaintiff has caused the date of said alleged letters patent, by itself or together with the word "patented," to be affixed on any of the ticket dispensers manufactured by plaintiff, or under his authority.

Deny that the said invention is of any use or benefit or advantage to the public, or that the public has generally or at all, accepted, or acquiesced in any alleged exclusive rights of plaintiff in the premises.

Deny that the plaintiff at any time was in the undisturbed possession, or use, or enjoyment of any exclusive rights, or privileges under said alleged letters patent. [11]

That defendants are without knowledge whether plaintiff has received any gains, or profits, under said alleged letters patent.

#### V.

Defendants deny that they have, or either of them has, in any manner infringed upon said alleged letters patent, or that plaintiff has been, or is, deprived by any act of defendants, or either of them, of anything to which he is entitled under said alleged letters patent.

Deny that anything done by defendants, or either of them, is any injury to plaintiff whatsoever, or is any encouragement, or inducement, to others to infringe upon said alleged letters patent; or that there is any cause for enjoining any act of defendants whatsoever.

#### VI.

Defendants are without knowledge as to how, or

in what quantity, or for what purpose any products of plaintiff have been, or are being manufactured, or whether there is any demand by the trade therefor.

Deny that plaintiff's business or manufacture or products have required a name or reputation in or with the trade, or in any place.

#### VII.

Deny that plaintiff was the first person to use, in any place, a vending machine, or display-board, as a method of advertising, or for promoting any business; or that plaintiff at any time, or for any period had any continuous, or exclusive, use of said devices, or method, or either thereof.

Defendants are without knowledge as to how plaintiff has used said Ticket Vending Machine, or whether he used the same at all, or whether plaintiff used a display-board in his business transactions, or at all, or whether plaintiff has expended any sum for advertising, or for establishing the same, in any place, or otherwise.

#### VIII.

Defendants deny any knowledge of any fact alleged in the bill except as in this answer expressly admitted.

Deny further that they have wrongfully or unlawfully counterfeited or imitated, said, or any, Ticket dispensing machine, or display-board, [12] for any purpose, or that defendants are, or either of them is now doing so.

## IX.

Deny that they have, or either of them has, been guilty of:

A. Any unfair or fraudulent, or unlawful act whatsoever, or unlawful use of a Ticket Vending machine for any purpose;

B. Or, of any unfair, or fraudulent, or unlawful use of a display-board upon which merchandise is displayed, or otherwise;

C. Or, of any unfair or fraudulent, or unlawful method of procuring business;

D. Or, that the defendants have, or either of them has, been guilty of any act or conduct, whatsoever, having for its purpose, or intent, or effect to appropriate, or unlawfully infringe upon any right of plaintiff; or to cause the public to become confused, or deceived into purchasing any products of defendants upon the strength of the popularity, or reputation of plaintiff's products; or that the public by reason of any unlawful act of defendants or either of them have been deceived, or confused, or giving the defendants any unfair advantage, or constituting any unfair competition, or causing any damage to plaintiff whatsoever.

## X.

Defendants deny that either of them has been, or is constructing, or selling, or using any Ticket Dispensing Machine substantially or at all, the same in construction, or operation, as in said alleged letters patent described, or claimed; or that the plaintiff has suffered any injury, or damage by any unlawful act of the defendants whatsoever, or that any of the



defendants has been guilty of any act in the premises contrary to law, or equity, or good conscious, or a wrong or damage to the plaintiff in any respect whatsoever.

Defendants further deny that plaintiff has any cause or complaint in law or equity against these defendants whatsoever, or either thereof for anything done by the defendants or either of them.  
[13]

#### XI.

Defendants further deny that they intend to make, or sell, or use in any place, the alleged improvement described in said alleged letters patent, or that either of them has done or purposes to do any act, or thing whatsoever in violation of any exclusive right or privilege vested in the plaintiff, or contrary to law, equity or good conscience, or tending to any injury of the plaintiff in the premises.

#### XII.

Defendants deny that in a cause Number 8251, entitled "Joseph F. Dwyer, vs. Enlow et al," or in any other suit or action, the above described patent was in issue, or was the subject of adjudication or was adjudicated; defendants are without knowledge as to the alleged other proceedings in said suit.

#### XIII.

Defendants deny that they are conspiring with anyone, or that anyone is conspiring with them, for encouraging the infringement of said alleged patent or any other purpose whatsoever.

#### XIV.

Defendants deny that in order to adequately, or at

all, protect any rights of the plaintiff, it is necessary that a preliminary injunction be issued pending this suit, or that a perpetual injunction be issued to restrain any act of either of defendants in the premises.

## XV.

And for further and separate answer, the defendants allege.

That the device described in said alleged letters patent, does not contain or involve any patentable invention, but shows merely obvious mechanical contrivances, well known to, and in the possession of, the public long before the alleged invention thereof by plaintiff.

## XVI.

And for a further and separate defense allege:

That the alleged invention described in said alleged letters patent, relates to an art well and highly developed long before said plaintiff entered the field with his said alleged improvement, as is [14] shown by the following letters patent of the United States to wit:

Whitaker, et al. ....	June 11, 1872	#127,722
Shoup .....	Oct. 9, 1883	286,493
Kirk .....	March 2, 1897	577,862
Springsteen .....	Aug. 29, 1899	632,070
McCourt, et al. ....	Aug. 9, 1904	767,233
McCourt, et al. ....	Jan. 23, 1906	810,791
Connors, et al. ....	June 11, 1912	1,029,490
Walsh .....	Oct. 6, 1914	1,112,501

That, therefore, the alleged improvement of plaintiff, if it did constitute an invention, was of a very

specific and limited character, and must be so construed in order not to encroach upon the rights which were vested in the public at the time plaintiff entered said field.

That when said application for said alleged letters patent came up for examination before the Commissioner of Patents of the United States, the said application contained the following claims in addition to those now contained in said alleged letters patent, to wit:

A ticket-dispenser comprising a receptacle, an inclined shelf formed on one side of said receptacle and provided with ticket receiving grooves that communicate with the interior of said receptacle by slots, fixed ribs separating said grooves; a transparent plate adapted to rest on said ribs and cover said grooves whereby the tickets contained in said grooves will be visible; and means for supporting ticket rolls within said receptacle whereby the tickets may be dispensed through said grooves.

A device for dispensing tickets from a ticket roll comprising a receptacle; and inclined shelf on one side and provided with grooves that communicate with the interior of said receptacle and are adapted for the reception of tickets, the side of said receptacle being cut away adjacent the outer ends of said grooves to provide finger recesses; fixed spacing ribs separating said grooves a transparent plate adapted [15] to rest on said ribs and cover said grooves; a shaft for supporting ticket rolls within said receptacle, whereby the tickets may be dispensed through said grooves; means for spacing said ticket rolls



apart on said shaft; and tension devices for permitting said tickets to be withdrawn from said receptacle but preventing said tickets from being pushed back into said receptacle.

A device for dispensing tickets from a ticket roll comprising a receptacle having grooves through which the tickets may be withdrawn, of means within said receptacle for supporting rolls of tickets, and tension means for yieldingly engaging said tickets and permitting said tickets to be withdrawn from said receptacle, said tension means being adapted to prevent said tickets from being pushed back into said receptacle.

That said Commissioner rejected said claims on the ground that the invention therein described lacked patentable novelty in view of the disclosures made by the above specified prior letters patent; and that thereupon said Dwyer acquiesced in said judgment of the Commissioner of Patents, and in compliance therewith canceled said claims from his application, in order to distinguish his alleged invention from said prior art as described by said prior patents, and restricted himself to the specific claims now appearing in the said alleged letters patent; all of which facts appear on the face of the file-wrapper, or record, of the application of plaintiff for said letters patent, a certified copy of which, together with copies of said prior patents (the latter also duly certified if required) will be duly proffered in court.

## XVII.

And the defendants further answering allege:

That the alleged letters patent in the bill of complaint referred to are, and always have been void, for the reason that the alleged improvement therein described was well known, and in public use in the United States, long before the alleged invention thereof by the plaintiff; and the defendants are now making a further search with regard to said [16] prior knowledge and use by the public and will disclose the same by amendment to this answer, or otherwise, as the Court may direct, upon having ascertained said facts.

#### XVIII.

And the defendants, Lew Rubenstein, Ben Levin and Winnie Sullivan, for a further and separate defendants allege;

That they are merely employees of the defendant Paul Harbaugh, and never had, nor now have, any interest whatsoever in the matter set forth in the bill, and have no knowledge of said matter, save as they are informed by said bill; and all allegations of the latter as against these defendants are wholly untrue and false in fact.

#### XIX.

And the defendants further answering allege:

That neither of the defendants, excepting Paul Harbaugh manufactured any Ticket Merchandise Dispensing Machine. That the machine so manufactured by the defendant Harbaugh, embodies new and original devices and combinations as defendants verily believe on which the said defendant Harbaugh has made an application for letters patent of the United States which application is pending before

the Commissioner of Patents; and, if there is any resemblance in the outward appearance of the device manufactured by defendant Harbaugh, with that manufactured by plaintiff it is due solely to physical and structural requirements common to said device.

That, furthermore, the said Harbaugh in placing his machine on the market has carefully marked the same with the trade name "General Vender" in conspicuous letters appearing on the face of the machine; and also marked the face of his said machine with the name "General Novelty Co.," each of said markings being adopted by said defendant Harbaugh for the express purpose of distinguishing his said machine from any other machine on the market to his knowledge; and that there never was, or could be, any confusion of the vending machine of said Harbaugh, with the vending machine described by said alleged letters [17] patent, or that made by the plaintiff, nor would one be substituted for the other by any one desiring to purchase one in preference to the other, and exercising ordinary care in his selection.

## XX.

And the defendants further allege:

That the plaintiff is seeking to establish a monopoly in the use of a vending machine, either by itself or in connection with a display-board such as commonly in use, and is attempting to drive said defendant Harbaugh out of said business and to prevent him from manufacturing any vending machine, or competing with the plaintiff in the sale of merchandise similar to that sold by the plaintiff. And instead of the defendants or either of them, being

guilty of any unfair competition in the premises whatsoever, the plaintiff is seeking to bring about an unfair restraint on said Harbaugh's business, and the sale of his merchandise.

## XXI.

And the defendant Paul Harbaugh further and separately answering the bill, alleges that the plaintiff is well aware that the defendant Harbaugh has gone to great expense in the manufacturing of his, said Harbaugh's own Ticket Dispensing Machine, all of which expenses will be an absolute loss to the defendant Harbaugh, would work an irreparable damage and hardship on him if he were not permitted to use his said machine merely because of physical requirement, there is a remote resemblance between the exterior of the vending machines made by the defendant Harbaugh and that made by the plaintiff.

Having thus made full answer to the matters and things contained in the bill: The defendants pray that the bill be dismissed, and for judgment for the cost and disbursements by them incurred.

I. HOLSMAN.

PAUL C. HARBAUGH.

OTTO J. KRAEMER.

JOS. L. ATKINS. [18]

T. J. GEISLER.

WINIFRED SULLIVAN,

LEW RUBENSTEIN,

Per T. J. G.,

BEN LEVIN,

Defendants.

Verification. Filed May 23, 1919.

**Memorandum Re Supplemental Answer.**

By consent and the permission of the Court, the defendant, Paul C. Harbaugh filed a supplemental answer in which he set forth the granting to him on May 11, 1920, of letters patent No. 1,339,823, for Ticket Dispensing Device, on an application filed in the United States Patent Office Feb. 13, 1919, serial No. 276,806.

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(Title.)

**Opinion.**

The Opinion of District Judge R. S. BEAN, Filed December 20, 1920, Dismissing the Suit.

ROBERTS & SKEEL, Seattle, Washington, Attorneys for Plaintiff.

T. J. GEISLER, Portland, Oregon, Attorney for Defendant.

R. S. BEAN, D. J.

This is a suit for an infringement of patent number 1,268,222, for a new and useful improvement in devices for dispensing tickets from a roll in a receptacle or box, issued to the plaintiff on June 4, 1918.

The plaintiff's original application contained five claims. Three of these were rejected by the patent office by reference to prior patents. Substantially the only new element in the claims as allowed consists in the manner of separating the ticket rolls. This is accomplished by a removable back for a re-



ceptacle "and guide members fixedly secured to said removable back wall adapted to be inserted between the ticket rolls on said shaft to hold said ticket rolls in spaced apart relation." Harbaugh does not use the roll or partition for separating the tickets but in his device the tickets are folded into packs and placed in separate pasteboard boxes so that in dispensing them one pack will not interfere with the other.

The claims of plaintiff's patent as allowed can not be construed to cover what was rejected by the Patent Office. (Knapp vs. Morse, 150 U. S. 221; Anthony vs. Gennert, 99 Fed. 95.) His patent, if valid at all is a [19] very narrow one consisting of but a slight improvement in the art. It must therefore rest upon the novelty of the specific means adopted to carry his idea into practical application. He is not entitled to a monopoly of analogous means. His patent covering, as it does, the combination of old elements with a new limited feature is confined to his specific device and can receive but little aid from the doctrine of equivalents. Where as here the patent depends upon a limited feature the doctrine of equivalents will not ordinarily be applied so as to cover a device in which that feature does not appear. (Broadway Towel Co. vs. Brown-Meyer Co., 245 Fed. 659; Anthony vs. Gennert, *supra*; Liberman's Ex vs. Ruwell, 165 Fed. 208; Miller vs. Eagle Mfg. Co., 151 U. S. 186; Barley vs. Witt & Co., 261 Fed. 77; Masteras vs. Hildreth, 263 Fed. 571; Logan vs. Baxter, 264 Fed. 514.) The method of separating tickets as disclosed by the Harbaugh

patent is not used by the defendant and therefore is not an infringement of plaintiff's patent although it accomplishes the same object by other means. (*Westinghouse vs. Boyden Power Brake*, 170 U. S. 537-568.)

There is another reason why I am inclined to think the Court should decline to grant plaintiff relief. If plaintiff's device is not a lottery or gambling device it borders closely thereon. It is the element of chance in its operation which gives it value and hence I doubt whether a court of equity, on grounds of public policy, should assume to protect him in a monopoly thereof.

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(Title.)

**Decree.**

The Decree Entered December 20, 1920, Dismissing the Suit.

This cause came on to be heard at this term and was argued by Roberts & Skeel of Seattle, Washington, of counsel for plaintiff, and T. J. Geisler, of Portland, Oregon, of counsel for defendants; and thereupon, upon consideration thereof it is

ORDERED, ADJUDGED AND DECREED as follows, viz.:

That there is no infringement on the part of the defendants of plaintiff's patent, and the plaintiff is not entitled to any relief. This cause is therefore dismissed, and defendants are entitled to their cost and disbursements to be taxed by the clerk of this Court.

Dated: Portland, Oregon. Dec. 20, 1920.

R. S. BEAN,  
District Judge. [20]

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(Title.)

**Petition for Correction of Decree.**

The Petition Filed by Defendant Paul C. Harbaugh,  
Dated Jan. 14, 1921, and Duly Verified, for Cor-  
recting Said Decree of Dec. 20, 1920.

To the Judges of the Above-named Court:

The petition of Paul Harbaugh, one of the above-named defendants, respectfully shows:

That this suit was brought by plaintiff against defendants for the alleged infringement by them of an alleged patent issued to the plaintiff June 4, 1918, No. 1,268,222 or alleged improvement in Device for Dispensing Tickets.

That at the time of bringing said suit your petitioner had manufactured, and was using also, in large quantities, a Merchandise Selling Device, and had expended large sums in connection therewith. That said alleged patent of plaintiff is and always was invalid, because not granted for any patentable improvement, and furthermore said device of defendant in nowise infringed upon said alleged patented device of the plaintiff; but nevertheless the plaintiff did represent to this Court that the defendant's said device did infringe upon said plaintiff's alleged patent, and claimed that because defendant was carrying on a similar business as that carried



on by plaintiff, by means of said devices, the defendants were infringing upon the exclusive rights of plaintiff in the premises; and upon such allegations the plaintiff did induce District Judge Wolverton to grant plaintiff on or about March 27, 1919, an injunction pending the trial of this suit, restraining the defendants, and each of them, their agents and employees, until a further order of the Court, from making, constructing, using, or selling, or causing to be made, constructed, used or sold, directly or indirectly, any Ticket Dispensing Machine like that which the defendant, General Novelty Co., was using at that time. That the granting of said temporary injunction was conditioned however upon the plaintiff complying with the following clause in said injunction order, to wit:

“This order shall not be effective until plaintiff shall furnish a surety bond in the sum of Ten Thousand (\$10,000) Dollars, or in lieu [21] thereof, shall deposit with the Clerk of the Court, United States Liberty Bonds of the par value of Ten Thousand (\$10,000) Dollars to secure the payment of any damage which may be awarded to defendants, if upon final adjudication it shall appear that defendants do not infringe the patents in suit.”

That thereupon the plaintiff in order to render said temporary injunction of this Court effective, and to put the same into force, did deposit with the Clerk of this Court, U. S. Liberty Bonds of the par value of Ten Thousand (\$10,000) Dollars, for the express purpose of securing the defendants

against any damage which may be awarded to them, if upon final adjudication it should appear that defendants' said device did not infringe the said alleged plaintiff's patent which was here in suit.

That thereafter upon a full hearing of this cause before the Honorable R. S. Bean, district judge, the Court found that the device used by defendants did not infringe upon said alleged patent of plaintiff, even if said patent is valid, and that the plaintiff is not entitled to any relief, and therefore dismissed this cause.

That by reason of the defendants, General Novelty Co., and your petitioner, Paul Harbaugh being restrained by said temporary injunction during the pendency of this suit they sustained great and irreparable damage, and, furthermore, while defendants were so restrained the plaintiff was enjoying a monopoly of the business in which he had no exclusive rights. That the fact that the express purpose of plaintiff in inducing this Court to grant said unlawful injunction was that plaintiff might profit by the monopoly which plaintiff so inequitably and unlawfully obtained of said business. And that plaintiff did make large sums of money by reason of such monopoly and of the exclusion of defendant from the field, notwithstanding defendants had as much right to be in said field as did the plaintiff; and thus the defendants not only suffered great loss, but the losses which defendants so sustained by reason of their unlawful restraint in business, as [22] aforesaid, resulted in great profits to the plaintiff,

which profits would not have been made but by said unlawful enjoining of defendants.

That the damage and loss which defendant so sustained by reason of the plaintiff wrongfully obtaining said temporary injunction far exceeds the said \$10,000.00 par value of said Liberty Bonds.

That in entering the decree of dismissal herein the defendants inadvertently omitted to include in such decree any direction of this Court with regard to the ascertaining of the damage sustained by defendants by reason of said wrongful temporary injunction, and for the application of the said security, now still deposited with the Clerk of this Court, towards the remedying and relief of the injuries and damage which the defendants sustained as aforesaid.

That therefore your petitioner prays on behalf of himself and his codefendants that the decree of dismissal entered in this cause under date of Dec. 20, 1920, be amended in conformity with rules 72 and 19 of the Rules of Practice in Equity by adding to said decree in substance the following direction, in order to protect all rights and remedies of the defendants in the premises in conformity with equity, to wit:

Vacating and setting aside the said temporary injunction so wrongfully granted to plaintiff in this suit; reserving the matter of ascertaining the damages sustained by defendants or either thereof because of said temporary injunction for such further proceedings and decree in this suit as to the Court may seem meet; and directing that the \$10,000.00

par value of Liberty Bonds deposited with the Clerk of this Court to indemnify the defendants against damage due to said wrongful injunction be retained in the hands of the Clerk to abide the further order and decree of the Court in the premises.

And your petitioner further prays: That thereupon the defendants and each of them may file their petition in this Court for the damages sustained by them, or either of them, by reason of said injunction so unlawfully obtained by plaintiff against defendants in this [23] suit, and that thereupon this Court direct the mode and manner in which such damages be determined; and that the amount so ascertained be satisfied as far as possible out of the sum obtainable from said Liberty Bonds on deposit with the Clerk of this Court; and that the Defendants may have such further order and relief in the premises as may be just and equitable.

Dated: Portland, Oregon. January 14, 1921.

PAUL C. HARBAUGH,  
Petitioner.

T. J. GEISLER,

Of Counsel for Defendants and Petitioner.

Verification. Filed January 17, 1921.

(Title.)

**Petition to Have Damages Determined.**

The Petition Filed by Defendant, Dated Jan. 15, 1921, Duly Verified, for Determining damages Sustained by Defendants by the Wrongful Temporary Injunction Issued in This Suit.

To the Honorable the Judges of the Above-entitled Court:

The petition of the above-named defendants respectfully shows:

That this suit was brought by plaintiff to restrain the defendants from an alleged infringement of alleged letters patent of the United States, issued to plaintiff June 4, 1918, No. 1,268,222, for Device for Dispensing Tickets, and also to recover damages for said alleged infringement by defendants.

That at the time of the bringing of this suit the plaintiff moved for a temporary injunction pending the trial of this case, enjoining the defendants and each of them, from making, using, or selling, or permitting others so to do, any Ticket Selling Devices which employs or embodies the structure defined in the claims of the said alleged patent, or any device similar thereto.

That the defendants resisted said application for temporary injunction by the plaintiff and to that end employed counsel, also appeared in Court and submitted the particular device which they, the [24] defendants were using; that the hearing of said application coming on before the Honorable Charles E. Wolverton, District Judge, the plaintiff



did then and there represent that he was entitled to a broad interpretation of the claims of his said alleged patent, and did then and there insist that while the defendants' device was not made specifically as the claims of said alleged patent prescribed, nevertheless, defendants' device and all similar thereto were within the terms of plaintiff's patent.

That the broad construction which plaintiff so contended for as covered by his said alleged patent had, in fact, been previously contended for before the honorable commissioner of patents in the presentation of plaintiff's application for his said alleged patent, to the knowledge of the plaintiff, and been considered by the said United States Commissioner of patents, but had been rejected by the latter, and plaintiff was restricted to the specific claims which appear in his said alleged patent. That notwithstanding such knowledge on the part of the plaintiff he concealed such facts from said Judge Wolverton, and thereby misinformed and induced the Court to enter a temporary injunction order containing the following provision and prohibition:

“That the said defendant, General Novelty Co., its members, owners, copartners, officers, agents and employees are hereby restrained and enjoined, pending this suit or until further order of the Court, from making, constructing, using or selling, or causing to be made, constructed, used or sold, directly or indirectly, any Ticket Dispensing machine which employs or embodies the structure defined in the claims of plaintiff's United States letter patent No. 1,268,222;



this order specifically includes any device similar to the defendants' device now in the custody of the Court."

That the said District Judge, in said injunction order, and acting within the discretion in him vested, did incorporate the following clause, with which the plaintiff was required to comply in [25] order to make said injunction effective, that is to say, said injunction order provided as follows, to wit:

"This order shall not be effective until plaintiff shall furnish a surety bond in the sum of Ten Thousand (\$10,000) Dollars, or in lieu thereof, shall deposit with the Clerk of the Court, United States Liberty Bonds of the par value of Ten Thousand (\$10,000) Dollars to secure the payment of any damage which may be awarded to defendants, if upon final adjudication it shall appear that defendants do not infringe the patents in suit."

That thereupon the plaintiff deposited with the Clerk of this Court, United States Liberty Bonds of the par value of Ten Thousand (\$10,000) Dollars, for the purpose of rendering said injunction order effective, and thereupon the defendants did faithfully obey the said injunction order to their great damage, however, as hereinafter stated.

That thereupon this cause was brought to trial before the Honorable R. S. Bean, District Judge. And thereupon the Court upon being fully advised did find that the plaintiff was not entitled to any relief, and did enter its decree Dec. 20, 1920, dismissing this suit, and thereupon the question of any damages

sustained by the defendants or either thereof, by reason of said temporary injunction wrongfully issued in his suit against the defendants was referred to ———, Master, to ascertain the facts and report thereon to this Court for its further order and decree in the premises.

That at the time of the bringing of this suit the defendant Paul Harbaugh, doing business under the name General Novelty Co., had manufactured in large quantities, and was using a certain merchandise Selling Device, and in order to do business therewith, had purchased large quantities of merchandise especially adapted for being sold in connection with such devices, and had also expended large sums of money in connection therewith, to wit, about \$5,000.00.

That the defendant, Paul Harbaugh, being a large competitor of the plaintiff, who was engaged in a similar business as said defendant [26] Harbaugh, the plaintiff brought this suit for the express purpose of obtaining an unlawful and inequitable monopoly of the said business and of preventing the defendant Harbaugh, and those associated with him to exercise the lawful rights which they had in carrying on their said business; and that by obtaining said temporary injunction the plaintiff did procure for himself an unlawful monopoly, and did particularly prevent defendant Harbaugh and those associated with him from carrying on a business similar to that of plaintiff, and thereby the defendants did suffer great damages, namely, the goods and merchandise which defendant Harbaugh had purchased

for the express purpose of using in connection with his said merchandise selling devices which were especially chosen and adapted for such purpose and therefore when defendant Harbaugh was not permitted to use his own merchandise selling devices the said merchandise which he had bought to use in connection with the latter became deteriorated in value and had to be sold at a loss of about \$2,000.00.

That had defendant Harbaugh been permitted to carry on his said business without the restraint of said temporary injunction order he would have realized out of his business the profits amounting to the sum of about \$25,000.00.

That defendant had his business, at the time when enjoined, well established, and that prior to his being enjoined to use his said Merchandise Selling Devices, his business was bringing him a net profit of about \$1,200.00 per month.

That by reason of the plaintiff, thru his misrepresentation of the facts to this Court and concealing from the Court the true facts concerning his said alleged patent, and the claims thereof, and the scope of such claims, the plaintiff unlawfully and inequitably succeeded in producing for himself a substantially exclusive monopoly and made large sums of money, the amount of which defendants can not state at this time, but hereafter will have endeavored to establish, and which money so made because of plaintiff's unlawful monopoly, represented to [27] a large extent the profits which defendant Harbaugh would have made if his lawful rights had not been interfered with by said wrongful tempo-

rary injunction herein issued, and which profits furthermore, the defendant Harbaugh would have made in lawful competition with plaintiff in those places and localities where both plaintiff and defendant were operating their merchandise selling devices and selling their goods prior to the commencement of this suit.

That furthermore defendants were obliged to and did hire counsel to defend themselves in this suit, and against said wrongful temporary injunction, and paid their attorneys the sum of \$500.00 which was the reasonable value of the services necessarily rendered by said attorneys in protecting the rights of the defendants in the premises.

Wherefore, your petitioners pray that the Court may ascertain the damages which the defendants and each of them incurred in this suit by reason of said wrongful temporary injunction, and that the plaintiff be required to pay the sum so found to the defendant in accordance with the directions of this Court, and that the security to wit, the Liberty Bonds in the par value of Ten Thousand (\$10,000) Dollars now on deposit with the Clerk of this Court as aforesaid, be applied in satisfaction of the damages so awarded by this Court in the premises, and that the defendants and each of them may have such other and further relief in the premises as may to the Court seem just.

Dated: Portland, Oregon. January 15, 1921.

T. J. GEISLER,

Attorney and of Counsel for Defendants.

PAUL C. HARBAUGH,

One of the Defendants.

Verification. Filed January 17, 1921.

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(Title.)

**Order Correcting Decree and Granting Reference  
to Master.**

The Order Entered Jan. 17, 1921, Correcting Said  
Decree of December 20, 1920, and Granting  
Reference to Master.

The petitions of the defendant, Paul Harbaugh,  
verified January 14, 1921, and January 15, 1921, re-  
spectively, came on to be [28] heard at this term,  
and was argued by counsel for the respective par-  
ties, and thereupon, upon consideration thereof, and  
the stipulation of the parties, dated January 4, 1921,  
it is

**ORDERED, ADJUDGED AND DECREED, as  
follows:**

That the decree herein entered before the date of  
December 20, 1920, be and the same is hereby cor-  
rected by adding thereto the following:

And it is further **ORDERED AND DECREED**  
that the injunction order herein entered on or about  
March 27, 1919, be and the same is hereby vacated,  
and the injunction thereunder be and the same is  
hereby dissolved.



And it is further ORDERED that the matter of ascertaining what, if any, damages the defendants, or either of them, sustained by said injunction order be referred to Robert F. Maguire, Esq., the Standing Master of this court, to ascertain the facts and report to this Court his findings in the premises with all convenient speed.

And it is further ORDERED that due notice of all hearings before the said Master be given to plaintiff, who may also submit testimony at such hearing, if he so desire, on said question of damages, and the said Master is directed to proceed in said hearing before him in conformity with the Rules of Practice in Equity.

And it is further ORDERED that the Liberty Bonds heretofore deposited with and now in the custody of the Clerk of this court in this cause, which deposit was made by plaintiff to secure the payment of any damage which may be awarded to defendants, if upon final adjudication it should appear that the defendants did not infringe the patent in suit, in compliance with the provision contained in, and as a condition precedent to the making of said injunction order effective, be retained in such custody, and subject to the further order and decree of this Court herein.

Dated: January 17, 1921.

R. S. BEAN,  
Judge. [29]



**Memorandum Re Appeal from Decree, etc.**

Appeal was duly taken by the plaintiff from said decree of Jan. 20, 1920, and the order of Jan. 17, 1921, correcting said decree; but said appeal was later dismissed by the Circuit Court of Appeals for the Ninth Circuit because the appellant failed to print the record in compliance with Rule 23 of the Appellate Court.

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(Title.)

**Report of Master on Damages.**

The Report of the Master on Reference to Him  
as to Damages Sustained by the Defendants.

Filed June 5, 1922.

On March 22d, 1919, the plaintiff brought the above-entitled suit, and on March 27th, 1919, obtained a preliminary injunction restraining defendants from issuing or using a certain ticket dispensing machine which plaintiff claims was an infringement of his patent. The injunction was issued upon condition that the plaintiff deposit the sum of \$10,000.00 to secure the payment of any damages which may be accorded the defendants in the event that they did not infringe upon the patent in suit.

A trial of the issue was had and the Court dismissed the plaintiff's bill upon the specific finding that defendants' device did not infringe his patent. The matter has since been referred to the Master to assess the defendants' damages. Hearing has

been held and testimony taken, copies of which and the exhibits offered at the hearing are submitted with the Master's report.

The plaintiff urges the following objections to the assessment of damages:

1. That the imposition of damages is discretionary.

2. That the device is a gambling device and for that reason no damages should be assessed against plaintiff.

3. That the defendant Harbaugh cannot recover on the ground that he is not the real party in interest.

4. That there has been a violation of the injunction which precludes any right to damages.

The Master has not considered in his report the first of these [30] objections for two reasons: First, that the Court's order to him directs him to assess damages if any sustained, and second, that the evidence does not disclose that degree of good faith on the part of the plaintiff in obtaining the injunction to warrant the exercise by the Court of any discretionary power. The testimony clearly shows that the plaintiff and defendants had a practical monopoly of the field in question, and that by the issuance of the injunction there flowed to the plaintiff all the profits of the business.

In determining whether or not the defendants can recover at all the Master has experienced considerable difficulty. Both plaintiff and defendants admit that the device used by them in their respective business was in fact a gambling device, and

in addition to the suggestions found in your Honor's opinion the Supreme Court of Washington in the case of

Dwyer vs. City of Seattle, 199 Pacific 740, holds that it is an ingenious device which is intended to and did appeal to the gambling instincts of the community, and clearly falls within the prohibition of the gambling statute.

Both parties admit that the owner of a gambling device or gambling house could not recover damages for profits lost by reason of interference with this unlawful business. The defendant, however, takes the ground that by obtaining this unlawful injunction the plaintiff is now in possession of profits, which otherwise would have accrued to the defendant, and therefore plaintiff is the defendant's trustee *ex maleficio* of the same, and having voluntarily given bonds to account for these profits he will not be permitted to retain these trust funds, which came into his possession through abuse of legal process.

It has long been the rule that for infringement of patent rights the plaintiff is entitled to recover the amount of gains and profits that the defendant has made by his unlawful use of plaintiff's invention: [31]

Tilghman v. Proctor, 125 U. S. 136, 145;

Westinghouse Company vs. Wagner Company,  
225 U. S. 604, 618.

These and the cases therein cited proceed upon the theory that the infringer by reason of his wrong has received funds in the nature of gains and

profits which in equity belong to the patentee. In the present case the situation is reversed. We have two people enjoying a monopoly of the business, each claiming under separate patents. The plaintiff by use of a restraining order unlawfully bars the defendant, his competitor, from the field, and thereby obtains profits, which otherwise would have been the defendant's. A question arises as to whether or not the rule invoked in the case above-mentioned applies in a suit disclosing the fact last described.

There does not seem to be any good reason why it should not, unless the fact that these funds arose from the use of a gambling device bars any recovery whatsoever.

It is to be remembered that these parties were not partners in an unlawful business, that the moneys received did not arise from any prohibited or unlawful contract between them. The defendant's claim for damages to his business has been abandoned and he now claims an accounting for the profits which he says the plaintiff obtained which in fact belonged to him.

The Court in compelling the plaintiff to so account does not thereby give vitality to any illegal contract or agreement between the parties or to any illegal contract which they may have made independently of each other. These profits if they exist, are now a fund in the plaintiffs hands. The transactions have long since been closed, and the Master is of the opinion that the case of *Martin vs. Brooks* (69 U. S.), 2 Wall, 70, is directly in point,

and its principles govern this case. This was a suit for an accounting between parties who had been engaged as partners in the business of purchasing returned soldiers' warrants in violation of the Act of Congress. The transactions had long been closed, and a large sum of money had been [32] realized therefrom, which was in the hands of one of the partners, who refused to account. As a defense he set up the fact that the purposes of the partnership were unlawful and that a court of equity would not step in to enforce its terms, but would leave the parties as it found them. In its opinion the Court says:

“Does it lie in the mouth of a partner who has by a fraudulent means obtained possession and control of all these funds to refuse to do equity to the other partner, because of the wrong originally done or intended to the soldiers? It is difficult to see how the statute enacted for the benefit of the soldiers is to be rendered any more effective by leaving all this money in the hands of Brooks instead of requiring him to do exact justice as between himself and his partner, but what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts and cannot be affected by any action of the court in this case. \* \* \*



“The difference between enforcing illegal contracts and asserting the title to money which has arisen from them is distinctly taken in *Tenant vs. Elliott*, 1 Bos. & P. 3, *Farmer vs. Russell*, 1 Bos. and P. 29, and recognized and approved by Sir William Grant in *Thompson vs. Thompson*, 7 Ves. 473.”

It is true that the Supreme Court in the later case of *McMullen vs. Hoffman* (174 U. S. 639), 43 L. Ed. 117, held that it would not extend the doctrine of the case of *Martin vs. Brooks*, and refused to permit an accounting between partners who had by collusive bids obtained public contracts. The Supreme Court, however, in the last named case clearly holds that a Trustee or third person having funds belonging to another cannot set up the illegal source of such funds.

Dwyer was not a partner of Harbaugh, but a competitor, by his wrongful use of the Court's injunction there have come into his hands funds which belong to the defendant. His possession of the same resulted not from the agreement on Harbaugh's part, but against his wishes, and by reason of an order of the Court which Dwyer himself obtained.

Had Harbaugh placed these funds in the hands of a third person there could be no question as to his right to recover, irrespective of the source of their derivation. If they had been stolen the thief could have been prosecuted, and why should one who has deposited [33] bonds at the instance of the Court to answer for damages by reason of an im-



proper writ be permitted to avoid the penalty when its impropriety has been established by a decree of the Court.

The Master, therefore, finds:

That the fact that the device is a gambling device does not bar the defendant Harbaugh from recovering any profits which Dwyer obtained by reason of the restraining order and that as to those profits Dwyer is in the position of a trustee *ex maleficio*.

The next objection raised by the plaintiff is that Harbaugh is not such a party in interest as will sustain a right to recovery

Harbaugh is a patentee. He testifies that no one else at the time of the institution of the suit was interested in the patent or in the business which he conducted, but that thereafter he entered into an arrangement whereby the profits of this business were pooled with profits which might be derived from various other businesses run by one Holsman, one Flatow and one Savan. There were circumstances in the case which throw considerable suspicion upon his statements. Practically all of the merchandise used was purchased through Holsman, upon a portion of it Harbaugh paid only costs. The boxes which the defendant attempted to substitute in place of those enjoined were originally ordered and paid for by Holsman, although it is claimed that he was reimbursed therefor by Harbaugh. Large payments were made to Holsman in excess of moneys due him. The assumed business name certificates filed by Harbaugh were filed at the same time that assumed business name certificates

were filed by Flatow and Savan wherein each of them claimed to be the sole owners of certain jewelry businesses when in truth and in fact Holsman was a silent partner, and finally the four men pooled their profits from all these businesses.

But these circumstances, while suspicious, the Master does not believe are sufficient to overcome the direct and positive testimony of each of them to the effect that Harbaugh was and is the sole owner of the patent, and of the business arising therefrom. [34]

Nor does the fact that he has agreed to pool the profits of his business give rise to a defect in parties to this suit.

In *Tilghman vs. Proctor*, *supra*, the plaintiff's brother testified before the Master that he had acquired an interest in all license fees and recoveries under the patents. Neither the nature nor amount of this interest was definitely stated, and although the defendants there urged that plaintiff could recover his share only, the Supreme Court held that:

"Interest in the net proceeds of collections under the patent does not necessarily amount to legal ownership of the patent itself. It is plain therefor, as the case appears that there has been no want of joinder of the necessary parties."

#### FINDINGS.

The Master finds that the defendant Paul Harbaugh is the real party in interest in this suit, and that there is no defect in parties.

Question 4. The Violation of Injunction by the Defendant.

It appears from the testimony that after the issuance of the restraining order the defendant Harbaugh received from time to time various remittances from merchants in whose possession boxes had been placed prior to the issuance of the injunction, and that these merchants in many cases refused to return these boxes when requested to do so, by Harbaugh's traveling salesman. There is no testimony, however, to indicate that the defendant put into use any of these boxes after being prohibited from doing so, or that he furnished new merchandise or new rolls of tickets or did anything other than accept the money from the consignees of boxes placed in their possession prior to the date of the restraining order. It is extremely doubtful whether the receipt of the money was a violation of the Court's order, but in any event it was trifling in nature, and does not evidence any bad faith or intention to violate the injunction on the part of the defendant.

FINDINGS.

The Master finds that there was no material violation of [35] the restraining order by the defendant.

AMOUNT OF DAMAGES.

The evidence shows that during the 45 days immediately prior to the issuance of the injunction that the defendant was doing a large volume of business. From the boxes put in the hands of dealers during that period the defendant received the sum of \$11,256.00. Mr. Harbaugh testified that

the merchandise sold with these boxes cost approximately \$50.00 a box, amounting to \$5,633.00; that the amount paid salesmen was \$1,213.19; that incidental expenses amount to \$765.00, making a total expense of \$7,611.19, and a net profit of \$3,644.81, or a daily profit of approximately \$80.99.

It may well be as contended by plaintiff's counsel that there was no absolute certainty that these profits would continue in like amounts, but in all business the volume and profits fluctuate. If a generous allowance be made for fluctuation there can be no doubt that the defendant would have realized a profit of at least \$1,500.00 per month.

It is not necessary, however, for the Court to rest upon the figures given by the defendant, for the burden rests upon the plaintiff to account and show what portion of the profits he received were derived from the business which he took from the defendant by means of the restraining order.

The plaintiff admitted at the trial before Your Honor that the gross sales from his business for a period of thirty-six months ran from \$250,000.00 to \$500,000.00. His methods of operation were approximately the same as those of the defendant. It is not contended that the goods used by the plaintiff cost more than those used by the defendant, or that his costs of doing business were any greater. We have, therefore, satisfactory data from which to determine the net profits of the plaintiff, upon a basis of a minimum of \$250,000.00. He testifies that out of the gross returns of \$105.00 per box to him, \$40.00 of the same repre-

sented profits, and if this be a true statement, and there is no reason to suppose that the plaintiff overstated [36] his gain, his average monthly sales would be \$6,944.00 and his average monthly net profits \$2645.00. These figures have assumed the minimum amount of merchandise claimed to have been sold by the plaintiff. Of course, the profits would increase with the volume of sales, and if they reached the plaintiff's maximum of \$500,000.00 the monthly profit would be \$5,290.00.

There is no testimony as to what proportion of these sums represent the profits which otherwise would have gone to the plaintiff. Inasmuch, however, as the Master has found that the plaintiff became trustee for the defendant the burden was cast upon plaintiff by competent testimony to separate those profits which were rightfully his from this which belonged to defendant. This the plaintiff has not done, and, upon the theory that the Master has adopted, any loss arising from this confusion of funds must fall upon the shoulders of the plaintiff.

Westinghouse Company vs. Wagner Company,  
225 U. S. 604, 618.

Based upon the testimony of the defendant as to profits made during the time prior to the stoppage of his business by the Court's order and the admitted volume of business and profits made by the plaintiff and the failure of the plaintiff to properly account for those which belonged to the defendant, the Master makes the following findings:



That there came into the possession of the plaintiff by reason of the wrongful restraining order profits belonging to defendant Harbaugh in the sum of \$1,500.00 per month, and that the total amount thereof during the pendency of the injunction and from the 27th of March, 1919, to the 1st of January, 1920, at which date defendant ceased to do business, being nine months and three days, is \$13,650.00, and that defendant is entitled to recover that amount with interest from date of final decree against the plaintiff.

The Master prays that his compensation in the premises may be fixed and that due order be made for its payment.

Respectfully submitted,

ROBT. F. MAGUIRE,  
Master in Chancery. [37]

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(Title.)

### **Plaintiff's Exceptions to Master's Report.**

Now comes Jos. F. Dwyer, the plaintiff in the above-entitled cause, and excepts to the report of Robert F. Maguire, the Master in Chancery appointed by this Court, which report was returned to the Clerk's office of this court on the 5th day of June, 1922, and as and for his exceptions thereto, submits the following erroneous findings and rulings revealed therein:

1. That the finding of the Master that the defendant is entitled to recover damages for loss of



profits anticipated from the use of a gambling device, is contrary to law.

2. That the Master erred in not finding that no damages are allowed for loss of profits alleged to be due through the use of a gambling device.

3. That the finding of the Master that the defendant, Paul Harbaugh, is the real party in interest in this suit, is not sustained by the evidence given before him (see Transcript, pages 70, 106, 103, 150, 212, 267), and is contrary to law.

4. That the Master erred in not finding that the defendant Harbaugh was not the real party in interest and that he showed no financial loss to himself.

5. That the finding of the Master that there was no material violation of the restraining order by the defendant is contrary to the evidence given before him (see Transcript, pages 39, 135, 233).

6. That the Master erred in not finding that the defendant had violated the injunction and was therefore precluded from recovering any damages.

7. That the finding of the Master that there came into the possession of the plaintiff by reason of the wrongful restraining order, profits belonging to the defendant Harbaugh in the sum of \$1,500.00 per month, for a period of nine months and [38] three days between March 27th, 1919, and January 1st, 1920, is not sustained by the evidence given before him (see Transcript, pages 100, 196, 62, 190, 199), and is contrary to law.

8. That the Master erred in not finding that there was no tangible or satisfactory proof of loss

of estimated profits by reason of the mutilated, altered and inaccurate data presented by the defendants to prove this alleged loss of profits.

9. That the Master erred in not finding that the profits claimed by the defendant were so remote, contingent and speculative and so entirely dependent upon the exploitation of a gambling device contrary to law, as to bar the recovery of any alleged profits.

10. That the finding of the Master that the defendant is entitled to recover from the plaintiff the sum of \$13,650.00 with interest, is not sustained by the evidence, and is contrary to law.

11. That the master erred in not finding that the liability of the defendant in any event was limited to the amount of the bond, and that not further damages, interest or costs could be awarded against him.

12. That the Master erred in not finding that the defendant was not entitled to the assessment of any damages.

13. That the Master erred in not finding that the gambling device, being the principle cause of the Court's action in quashing the injunction, that no damages should be assessed against the plaintiff.

BARNETT H. GOLDSTEIN,  
E. L. SKEEL,

Attorneys for Plaintiff.

Filed June 7, 1922.

(Title.)

**Opinion on Exceptions to Master's Report.**

The Memorandum Opinion by District Judge BEAN, Filed July 17, 1922, on Master's Report.

The case of Dwyer *versus* Holsman was submitted on exceptions to a Master's report. Dwyer commenced a suit in this Court against the [39] defendants to enjoin the infringement of a patent for a ticket distributing device for the sale of merchandise.

This device consisted of a box containing some three thousand tickets. Each ticket was sold—or the right to draw a ticket from this box was sold to a customer for five cents, and 2975 of these tickets so drawn represented merchandise consisting of a collar button of the value of about one-half cent. The other twenty-five tickets contained on the face of them notations that the person who was fortunate enough to draw one of them would get merchandise of much greater value, but the box was so arranged that the customer could not see beyond the particular ticket that was exposed. It is therefore, clearly, and is now conceded to be, a gambling device.

At the time the injunction was issued and at the trial that fact was not emphasized by either party to this litigation, because they were equally guilty of a violation of the law and therefore they were disposed, apparently, to keep that fact in the

background. It was developed on the trial, however, of the merits of this controversy, by some inquiries of the Court, that such was the character of the device.

The complaint was dismissed upon a hearing on the merits, and on two grounds: First, that the defendants' device was not an infringement of the plaintiff's patent, and the Court intimated in the opinion that in any event it appeared to be a gambling device and a court of equity would not grant a party relief under such circumstances.

The matter was then referred to a Standing Master to ascertain and determine the amount of damages the defendants had suffered by reason of a preliminary injunction that was issued at the commencement of the hearing, and after taking the testimony he reported that in his opinion the damages amount to \$13,000.00 and recommended that a judgment be entered against the plaintiff and [40] his bondsmen, or his bond, for the amount of money. To this report the plaintiff has filed numerous exceptions, but in my judgment it is unnecessary to consider but one.

It is clear and accepted that a court of equity will not interpose to protect a party who is engaged in violating the law by operating a gambling device, and that is what this is, strictly, nothing but a gambling device. Now, the Master concedes that in his opinion, but he concludes that because it appeared that the plaintiff and defendant had a practical monopoly of this business and the plaintiff was permitted by reason of the injunction to continue

the business, that the profits, or a portion of the profits made by him during such time belonged to the defendant because the plaintiff became a trustee therefor *ex maleficio*, but in my judgment the vice of this position lies in the fact that this is in effect a proceeding to recover profits that the defendant would have made, or claims he would have made, if he had been permitted to operate a gambling device and violate the laws of the country. It is true under some authorities, where parties have entered into an illegal transaction and it has been consummated, and one has profits growing out of it belonging to the other, that the court will interfere to compel the party holding the profits to account to his partner, but that is not this case, as I take it, so that, without further comment, the conclusion of the Court is that the report of the Master should be set aside and the defendant denied any profits or any recovery because of this illegal injunction. He was prevented by the injunction, in effect, from violating the law of the country, and he claims now that he is damaged in a very large sum of money by reason of that fact.

Filed July 17, 1922.



(Title.)

**Decree Setting Aside Master's Report and Disallowing Petition for Damages.**

The Decree Entered July 17, 1922, Setting Aside the Master's Report and Disallowing Defendant's Petition for Damages.

This cause coming on for hearing upon the defendant's petition filed herein on January 17, 1921, for the allowance of [41] damages alleged to have been sustained by the defendants by reason of the issuance of the temporary injunction allowed herein; and,

It appearing to the satisfaction of the Court that a decree was entered herein on January 17, 1921, that the temporary injunction issued in this cause on March 27, 1919, be disallowed and referring the matter to the Standing Master of this Court to ascertain what, if any, damages were sustained by the defendants by reason of the issuance of the said temporary injunction; and,

It appearing to the satisfaction of the Court that the Standing Master has heretofore filed his report in connection therewith and exceptions thereto having been made and filed, and the said report having been duly considered by me after hearing the arguments of counsel, and having duly read and considered their briefs filed herein, and after having taken the matter under advisement and now being fully advised in the premises, the Court finds that no damages should be allowed to any

of the defendants herein by reason of the issuance of said temporary injunction; and,

IT IS HEREBY ORDERED AND DECREED that the Master's report be and the same is hereby set aside, vacated and held for naught, and that the defendants' petition for damages be and the same is hereby denied; and,

IT IS HEREBY FURTHER ORDERED AND DECREED that the petition of the plaintiff for the return of the Ten Thousand (\$10,000.00) Dollars in Liberty Bonds, deposited in this suit with the Clerk of this court, be granted, and that the same be returned to him, unless defendant shall within thirty days, perfect an appeal, with an approved bond in the sum of \$2500.00.

IT IS HEREBY FURTHER ORDERED that the fees of the Master in Chancery, be fixed at \$300.00 and that the same be paid jointly by the parties hereto.

R. S. BEAN,  
Judge.

Portland, Oregon, July 17, 1922. [42]

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And thereupon there was duly filed and entered in said court and cause

(Title.)

**Petition on Appeal.**

The Petition on Appeal by Defendant Paul C. Harbaugh.

The above-named defendant, Paul Harbaugh,

conceiving himself aggrieved by the decree in the above-entitled cause, entered July 17, 1922, vacating the report of the Master awarding damages to said defendant for the wrongful injunction issued herein March 27, 1919, and deciding that no damages should be allowed to any of the defendants herein by reason of the issuance of said wrongful temporary injunction,—

Therefore, this defendant does hereby appeal from decree and each and every part thereof for the reason set forth in the assignment of errors filed herewith, to this United States *Circuit of Appeals* for the Ninth Circuit, and prays that this appeal may be allowed and that a transcript of the proceedings of the District Court upon which said decree is based may be sent, duly authenticated, to said Court of Appeals.

Dated: Aug. 11, 1922.

PAUL C. HARBAUGH,  
Defendant.

T. J. GEISLER,  
Of Counsel for Defendant.

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(Title.)

**Order Allowing Appeal.**

Order of Allowance Thereof.

The appeal above prayed for is hereby allowed.

And it is further ordered that upon said defendant giving a bond on his said appeal in the penalty of Twenty-five Hundred Dollars (\$2500) approved by

this Court, that the Ten Thousand Dollars (\$10,000) in Liberty Bonds deposited in this suit with the Clerk of this Court by the plaintiff as security for and in compliance with the condition of said temporary injunction, be retained with the Clerk of this Court pending this appeal and further order of this Court.

Dated: Aug. 12, 1922.

CHAS. E. WOLVERTON,  
District Judge. [43]

Filed: Aug. 12, 1922.

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(Title.)

### **Assignment of Errors.**

There was further duly filed with said petition on appeal the assignment of errors.

Now, on this 11th day of August, 1922, comes the above-named defendant, Paul Harbaugh, by his solicitor and counsel, T. J. Geisler, and says the decree entered in the above-entitled cause on the 17th day of July, 1922, is erroneous and unjust to defendant:

#### **1.**

Because the District Court justified the illicit use by the plaintiff of the writ of injunction of this court to suppress the competitive business of defendant, on the ground that such business was illegal, notwithstanding the plaintiff was engaged in the same business as a competitor of defendant,

and profited directly by so suppressing the latter's competition.

## 2.

Because said decree is contrary to the principles of law, justice and equity governing the premises, and is particularly in violation of the principles which guarantees equal protection of the law to all persons, in that the District Court first interfered in the competitive business of the parties, and wrongfully enjoined said defendant from using his property in his business, thereby changing his position and condition in the premises, and enabling the plaintiff, by the illicit use of the process of this court, to make and take gains and profits from said defendant's business; and then the District Court abandoned defendant, and refused to require the plaintiff to comply with the conditions on which he obtained said illegal injunction, refusing to require him to restore to said defendant the gains and profits which he had so illegally taken from him.

## 3.

Because said decree is contrary to the principles of equity and justice, in that it permitted the plaintiff to profit by his own wrong in the premises, namely, to retain the gains and profits he made [44] by illegally enjoining the defendant, his competitor, and thereby unlawfully diverting and appropriating the business, and profits of defendant's business to himself.

## 4.

Because said decree is contrary to equity, and is



unjust to defendant, in that it disregards, and fails to give effect to, the condition which was the price at which plaintiff obtained and accepted the temporary injunction granted him in this cause, and later found to be illegal, and refused to require the plaintiff to make restitution to defendant of that which he illegally took from him by said illegal injunction.

## 5.

Because said decree is contrary to the principles of equity and justice, in that the District Court, tho still retaining control of the subject matter and the parties of this cause, refused to correct that which it had wrongfully caused to be done therein by its wrongful injunction, and refused to require the plaintiff to restore to said defendant the gains and profits which the plaintiff took from defendant's business, by illegally enjoining him.

## 6.

Because the District Court erred in decreeing that no damages should be allowed said defendant for the injury he sustained by the wrongful injunction obtained by the plaintiff herein, notwithstanding the finding by the Master that the plaintiff illegally took gains and profits from defendant's business under said illegal injunction and in equity now holds such gains and profits as trustee *male-ficio* for defendants.

## 7.

Because the District Court erred in sustaining the plaintiff's exception to the Master's report, also in setting aside and vacating said report and

refusing to allow to defendant any damages notwithstanding the facts as found in this cause.  
[45]

WHEREFORE said defendant prays that the said decree be reversed and that the District Court be instructed to enter such decree herein as the Court of Appeals shall deem just and meet.

T. J. GEISLER,

Solicitor and of Counsel for Defendants.

Filed August 12, 1922.

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(Title.)

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, that we, Paul Harbaugh, one of the above-named defendants, appellants, and Isadore Holsman, and Harry H. Holsman, both of Portland, Oregon, sureties, are held and firmly bound unto the above-named plaintiff in the sum of Twenty-five Hundred Dollars (\$2500) to be paid to the plaintiff, or his legal representatives, and for the payment of which we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of August, 1922.

WHEREAS the above-named Paul Harbaugh has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree entered in the above-entitled cause July 17, 1922, and desire that the Liberty Bonds deposited as

security by the above-named plaintiff be retained in the custody of this court:

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant, Paul Harbaugh shall prosecute said appeal to effect and answer all damages and costs awarded against him if he fail to sustain this appeal, then this obligation shall be void, otherwise to remain in full force and virtue.

PAUL C. HARBAUGH, (Seal)

Defendant, Appellant,

Principal.

I. HOLSMAN. (Seal)

HARRY H. HOLZMAN. (Seal)

Signed, sealed and delivered in the presence of:

W. E. RAMSEY.

ARTHUR HEDEEN. [46]

United States of America,

District of Oregon,—ss.

We, Isador Holsman and Harry H. Holsman, the sureties, named in the foregoing bond, being severally duly sworn, depose and say that each of us is a resident and a freeholder within said District, and that each of us is worth in property situated therein the sum of Twenty-five Hundred Dollars (\$2500) over and above all just debts and liabilities and exclusive of property exempt from execution.

I. HOLSMAN.

HARRY H. HOLZMAN.

Subscribed and sworn to before me this 11th day of August, 1922.

[L. S.]

ARTHUR HEDEEN,

Notary Public for Oregon.

My commission expires Nov. 12, 1924.

I hereby approve of this bond August 12, 1922.

CHAS. E. WOLVERTON,

District Judge.

Filed August 12, 1922.

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(Title.)

**Citation on Appeal (Copy).**

And thereupon, to wit, on the 12th day of August, 1922, there was duly issued the citation on said appeal:

United States of America,

District of Oregon,—ss.

To Joseph F. Dwyer, Plaintiff, GREETING:

WHEREAS, Paul Harbaugh, one of the above-named defendants, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law.

You are, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why

the said decree [47] should not be corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand at Portland, in said district, this 17th day of August, 1922.

CHAS. E. WOLVERTON,  
Judge.

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And afterwards, to wit, on the 9th day of September, 1922, there was duly entered in said appeal in the United States Circuit Court of Appeals for the Ninth Circuit, the following:

(Title.)

**Order Extending Time to and Including October 15, 1922, to File Record and Docket Cause.**

On the application of T. J. Geisler, of counsel for defendant, Paul Harbaugh, it is ordered that the defendants be, and are hereby allowed to and including the 15th day of October, 1922, in which to file a transcript of the record herein, with the United States Circuit Court of Appeals of the Ninth Circuit.

Dated the 9th day of Sept., 1922.

WM. B. GILBERT,  
Circuit Judge.

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And afterwards, to wit, on the 13th day of Oct., 1922, a further order was duly entered in said cause, extending time for filing transcript of record on appeal.



(Title.)

**Stipulation and Order Extending Time to and Including November 15, 1922, to File Record and Docket Cause.**

It is hereby stipulated that the defendant's time to file a transcript of record herein with the United States Circuit Court of Appeals for the Ninth Circuit be extended to and including the 15th day of November, 1922.

Dated: October 13, 1922.

ROBERTS & SKEEL,

FRANK A. STEEL,

Attorneys for Plaintiff.

T. J. GEISLER,

Attorney for Defendants.

On the foregoing stipulation, it is, on application of [48] T. J. Geisler, of counsel for defendant Paul Harbaugh,—

ORDERED that the defendants be, and are hereby allowed to and including the 15th day of November, 1922, in which to file a transcript of the record herein with the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: October 13, 1922.

R. S. BEAN,

Judge. [49]

On September 30, 1922, there was filed a praecipe for transcript of record:

(Title.)

**Praecipe for Transcript of Record.**

To the Clerk of the Above-named Court:

In making up the transcript of appeal now pending in this cause to the United States Circuit Court of Appeals, for the Ninth Circuit, please incorporate the following portions of the record:

1, The bill of complaint; 2, order dated March 27, 1919, granting plaintiff temporary injunction; 3, statement that the plaintiff deposited the United States Liberty Bonds called for by said order with the Clerk; 4, the answer; 5, a statement that the defendants filed a supplemental answer setting forth the granting of letters patent of the United States No. 1,339,823, on May 11, 1920, to the defendant, Paul C. Harbaugh, for Ticket Dispensing Device on an application filed in the United States Patent Office Feb. 13, 1919; 6, the opinion of the Honorable R. S. Bean, District Judge, filed December 13, 1920, dismissing the suit; 7, the decree entered December 20, 1920, dismissing the suit; 8, the petition, dated Jan. 14, 1921, filed by defendant Paul Harbaugh, for correction of said decree; 9, the petition of the defendants, dated Jan. 15, 1921, for determining damages sustained by defendants by the wrongful temporary injunction; 10, the order of January 17, 1921, correcting said decree, entered herein December 20, 1920; 11, statement

that an appeal was duly taken by the plaintiff from said decree herein entered December 20, 1920, and Jan. 17, 1921; 12, a statement that said appeal was dismissed, the appellant failing to print the record in compliance with Rule 23 of the said United States Circuit Court of Appeals; 13, the report of the Master on the reference to him as to damages sustained by defendants; 14, a statement that the plaintiff duly excepted to said Master's report; 15, the memorandum opinion by District Judge Bean, filed July 17, 1922; 16, the order entered July 18, 1922, [50] setting aside the Master's report, and disallowing defendant's petition for damages; 17, the petition on appeal by defendant, Paul C. Harbaugh; 18, the assignments of errors; 19, the bond on appeal; 20, the citation on appeal; 21, the condensed statement of the evidence, together with the approval thereof by the District Court; and 22, the praecipe designating the portions of the record to be incorporated into the transcript on said appeal.

And please note that the title shall not be printed in full, but merely the word "Title" printed, together with the designation of the paper; and the verification of the pleading shall not be printed in full, but merely the words "Duly Verified."

Furthermore, in making up the return to the said Circuit Court of Appeals please send all the original exhibits used in the District Court, both on the trial of the injunction suit and before the Master.

Dated: Portland, Oregon, Sept. 21, 1922.

T. J. GEISLER,  
Attorney for Defendant Harbaugh. [51]

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On Nov. 6, 1922, there was filed a stipulation amending praecipe:

(Title.)

**Stipulation Amending Praecipe for Transcript.**

It is hereby stipulated that the praecipe lodged by the defendant on appeal in the above-entitled cause be amended so as to include a full copy of the order dated March 27, 1919, granting plaintiff a temporary injunction, and also a full copy of the plaintiff's exceptions to the Master's report.

Dated: Nov. 2, 1922.

E. T. SKEEL,  
ROBERTS & SKEEL,  
Attorneys for Plaintiff.  
T. J. GEISLER,  
Attorney for Defendants. [52]

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On November 6, 1922, there was filed a statement of the evidence:

(Title.)

**Statement of Evidence.**

A Condensed Statement of All Parts of the Testimony Given in This Cause Essential to the Decision of the Questions Presented by This Appeal.

On the trial of this case by the District Court, to wit, October, 1919:

**Testimony of Joseph F. Dwyer, on His Own Behalf.**

JOSEPH F. DWYER, the plaintiff, being duly sworn, testified on his own behalf as follows:

We first began to manufacture these boxes (referring to Plaintiff's Exhibit 3) in 1917. I applied for a patent in January, 1918. My desire at the time of this invention was to produce a machine by which merchandise would practically sell itself. On these rolls of tickets the purchaser could always see what the merchandise would consist of which was sold for five cents. A great many of the tickets sold collar buttons and on various tickets thru-out the rolls the offer was of larger value. I started to sell them in the fall of 1917 and they were very successful. "I have up to now sold thousands of them. I would say I have done a business—while I have not referred to my books on it—of between two hundred and fifty thousand and five hundred thousand dollars." Sales were made in Oregon—this represents the value of the merchandise sold through those Silent Salesmen. Those sales were Oregon, California, Washington, Idaho, Montana and Alaska; were sold pretty generally throughout those states. My customers here in Portland had considerable trouble. This was the one point [53] we were not able to do a great deal of business, because after we got started, they got placed among the trade here, first came



(Testimony of Joseph F. Dwyer.)

Enloe, and his partner in this business located in the Phoenix Building, the same building that the defendants are located in, also the same floor, the fifth floor, and, as I was advised, they began business in the same premises formerly occupied by the defendant in the suit that I had brought prior against Enloe; and my customers here were interfered with through this imitating device, not alone imitating the device itself, but imitating the method of sales, and the style of merchandise that was used, and in many cases was put out by the retail dealer as the same thing that he had had before, the difference being the price, the cut price given him by the defendants in this case, the General Novelty Company. Outside of this territory, we have had scarcely any trouble with infringements. In the operation of it the purchaser reads on the ticket "collar button five cents when sold by the Silent Salesman." This ticket he buys; it brings into view a following offer or a following transaction.

#### Cross-examination.

I applied for my patent through Frank Warren, an attorney in Seattle. He advised me that the art relating to ticket vending machines was pretty well covered. I knew that it was an old idea to put tickets in the form of a roll or package and feed them through slots.

(The file-wrapper of the Patent Office of plaintiff's patent admitted in evidence as Defendant's Exhibit "A.")

(Testimony of Joseph F. Dwyer.)

I read the Patent Office letter of March 27th, 1918, and particularly the paragraph beginning with the word "Springsteen," August 29, 1899," reading: "No. 632,070, 211/37, which shows finger holds to enable the operator to grasp the tickets. Wash shows tensioning device No. 25; Whitaker et al., June 11, 1872, No. 127,722, shows a pivoted dog L for preventing strip being [54] pushed back into the receptacle."

My device was used for the sale of collar buttons. Each ticket had on it that the purchaser was entitled to one collar button. That was all that he would get for a nickel on that sale. The collar button was an ordinary five cent collar button—gold plate.

Q. Will you tell me the intrinsic value, the value to the trade of the collar button which you sold for a nickel? A. I can't tell you that.

Mr. SKEEL.—I object to that, even though the witness might be disposed to answer. The value of the collar button hasn't anything to do with this case at all.

COURT.—I don't see what that has to do with infringement of patent.

Mr. GEISLER.—I just wished to bring out all the facts connected with the case, and the purpose and use of this machine.

COURT.—I don't think the value of the merchandise has anything to do with the question of the validity of the patent or the infringement.

(Testimony of Joseph F. Dwyer.)

Mr. GEISLER.—I agree with your Honor on that.

Q. I would like to ask this question, if the Court wishes to be advised on it; if it is not a fact that the object of these devices was to introduce into the sale to the customer the chance of getting something more than the collar button?

Mr. SKEEL.—I object to that as being incompetent and immaterial. The question is, what was the device used by the defendant, and what the device covered by the patent. That is the only question in this case, the question of apparatus.

COURT.—I think the objection is well taken. I don't see how it is material. [55]

**Testimony of Henry L. Reynolds, for Plaintiff.**

HENRY L. REYNOLDS, being duly sworn, testified for plaintiff as follows:

I reside at Seattle, Washington. I am a patent attorney and expert. I am not an attorney at law, but a mechanical engineer by education, and have taken up the practice of patent solicitation, patent attorney in that sense. My practice is entirely confined to the patent office and as an expert in patent litigation. Graduated as a mechanical engineer from the University of Illinois, and then practiced as a draftsman designer for a year and a half or more before entering the patent office under the civil service examination as an examiner. I was an Examiner in the Patent Office between two and a half and three years. As an examiner in the patent

(Testimony of Henry L. Reynolds.)

office making examinations of applications filed and passing upon them, determining the question of patentability, whether to allow or reject certain claims. Since leaving the Patent Office I have been practicing practically all the time as a patent attorney in Seattle and New York City. I have examined U. S. Patent No. 1,268,222 issued to Joseph F. Dwyer. Also the patents referred to by the defendant in his answer, being all the patents which were cited during the prosecution of the Dwyer patent.

Figure 1 of the drawings in the Dwyer patent shows the perspective of the device, giving its appearance as seen from the outside. Figure 2 shows a cross-section of the box, shows that the inside of the box is a roll which roll may be duplicated as many times as desired. This box is shown as containing five rolls. All of these rolls being mounted upon a shaft. The rolls of tickets are withdrawn. The end of the ticket is withdrawn from the roll passing over a bar under a holding dog, which is pivoted, and thence outward through a slot into the side of the casing into a guide chute which is formed beneath the glass covering plate and into which an individual ticket chute is formed for each ticket strip. The chute upon which the ticket rolls are mounted is supported by [56] the end walls of the box. In order to keep the various ticket rolls separated and to hold them in position relative to the discharge chute, partitions are inserted between the rolls. The holding dog is held down on the ticket at the point where it passes over the guide bar.

(Testimony of Henry L. Reynolds.)

The position of this dog and its shape is such that it offers no material resistance to the outward pull of the ticket but engages the ticket and holds it well enough to prevent the backward movement of the tickets. This is due to the fact that the ticket strip itself is somewhat flimsy and is impossible to exert any material force upon this by pushing. The character of the chute through which the tickets are discharged, which chute, I believe, is referred to as the guideway. The covered plate of glass bears upon the top of the slight ridges which occur between the consecutive chutes and thus support the plate so as to provide a chute to be slightly larger than the tickets themselves. With this construction, it is an easy matter to withdraw the tickets but impossible to push them back into the case. The purpose of providing such means is to prevent the possibility of withdrawing and inspecting the tickets and then pushing them back and refusing to take them.

What I consider to be the substance and the essence of the invention is the purpose to provide a machine which may be used for conveniently handling a mass of tickets so that they may be withdrawn one at a time and to do that in such a manner that it will be practically impossible, if not entirely so, to withdraw the tickets and then reinsert them in the box. The means which carry out that purpose are that the rolls and its mounting is simply a convenient manner of storing tickets for the convenience in holding and for withdrawing as desired. The guide consists of a bar which forms a con-



(Testimony of Henry L. Reynolds.)

venient support for the ticket so that it may be engaged directly upon this or closely adjacent to it by a dog or other holding member so that the ticket may be easily withdrawn but cannot be pushed back. The guideway or chute through which [57] the ticket passes after leaving this bar is a convenient means for displaying the outer ticket of each set so that the purchaser can see before purchasing, and can get a hold of it for withdrawal. The most characteristic feature of that lies in the mechanisms which are closely associated with the dog and the ticket supporting guide.

In my judgement, a ticket pack, by which I mean a strip of tickets, which has been folded back and forth in what is sometimes called an accordion fold or pleat, is in every sense substantially equivalent to the roll. The roll is simply one convenient means for putting up the tickets. The ticket pack is another and equivalent one.

I consider that attaching the partitions to a removable back which slides out, or to a back which hinges, or securing them in some other way independent to the back, is substantially equivalent. Their sole purpose and function is to form a partition or division between the rolls so that the rolls will not act upon each other and spread and get tangled, we might say.

“Question. Now, I wish you would take Plaintiff’s Exhibit 2, purporting to be the defendant’s device in this case, and I will ask you to compare that device, first with the device of the plaintiff, Plain-

(Testimony of Henry L. Reynolds.)

tiff's Exhibit 3, and then with the patent, and with each claim, and each element of each claim."

"Answer. Commencing first with the ticket as it is stored; in plaintiff's device, the ticket is rolled in defendant's device, he has employed what I term a ticket pack, that is, the tickets are in strips; instead of being rolled are folded upon each other. In the defendant's device, a method of storing tickets has been used which in appearance is different. I say advisedly, 'in appearance,' because I consider it an essential equivalent. The ticket, instead of being rolled, is folded back and forth upon itself so as to make what I have termed a ticket pack; that is, the tickets are folded and packed down together so that they [58] will fit in a box; he has not employed a shaft, because a shaft is manifestly inappropriate in connection with the use of the ticket fold. The tickets are drawn out from the box in that way (illustrating). Now, as for partitions separating the rolls, I find in the defendant's device a substantial and close equivalent of the partitions used in the plaintiff's device. The box itself with its sides forms the partitions to keep the various packs separated, and if the device is turned up through ninety degrees we would then have partitions which were secured to a removable back, namely, what would be ordinarily referred to as the bottom of the box. They are secured to a removable back so that they can be drawn out together, and they serve to separate the stored tickets. The tickets then drawn from the pack, are drawn under

(Testimony of Henry L. Reynolds.)

the spring dog which presses the tickets down under a cross-bar. The cross-bar in the device is shown as located just inward from the inner end of the guideway or chute through which the tickets are projected. The purpose of this spring dog is to prevent backward movement of the tickets so as to prevent first withdrawing and then return of the tickets. In this device defendants have employed one member having the combined function of the spring and dog shown in plaintiff's device, but this union of two members of this type which necessarily coact upon each other, and neither of which would be used without the other, as is the case in plaintiff's device, is obviously an equivalent. The tickets after leaving this spring dog enter the guide chute. This part of the device is formed in a manner which is almost, if not completely identical, with the formation of the device in plaintiff's machine. The under side of the chute is cut away so as to make it possible to get the finger underneath the ticket in order to engage it or pull it out. Between the chutes is a partition which functions as the rib of the Dwyer patent drawing. The chute is covered by a glass plate which rests upon these ribs or partitions. The results secured in the one case are [59] the same as in the other, and the means for securing it are also the same. The result so far as inability to push the tickets back into the box, is the same one place or the other.

Considering Claim 1: "A device for dispensing

(Testimony of Henry L. Reynolds.)

tickets from a ticket roll," That is a simple statement as to what the device is intended for, and, as I have said before, I consider the ticket pack as used in the defendant's device, a full equivalent of the ticket roll of the plaintiff's device, and the term, under any reasonable doctrine of equivalents, would apply to it. "Comprising a receptacle," that receptacle is the outside casing box which is found in both. "Having grooves through which the tickets may be withdrawn"; these grooves consist of the openings which have been made between the interior cavity of the box and the inner end of the ticket discharge chute, and in the prior patent; these do not appear to be given a reference number anywhere, except in figure 4 where they are lettered 14. "Said receptacle being provided in each end wall with slots that extend from the rear side thereof forwardly." Those slots are shown on the inner surface of the end wall and functioned purely as a support for the end of the shaft which is used by plaintiff. In the defendant's device there is a slot in the end wall which is used to secure the board which carries the feed dogs or rather the holding dogs. As defendant uses a ticket pack, he has dispensed with the shaft. This would follow from the use of the ticket pack and this is equivalent of the other, so I don't consider that that is a material difference. "Said shaft being adapted to be inserted in said slots," I believe I read, it applies to previous members. "A removable back wall for said receptacle and guide

(Testimony of Henry L. Reynolds.)

members fixedly secured to said removable back wall adapted to be inserted between the ticket rolls on said shaft to hold said ticket rolls in spaced apart relation," the device as now put out by plaintiff and as shown by the exhibit which I have here has the back wall hinged to swing down instead of to pull up, and the partitions are not fixedly [60] secured thereto. They are supported from and secured to, but removably secured to bottom instead of the back. In other words, the position of these parts has been changed by rotation through ninety degrees in effect. The corresponding member, as shown in the defendant's device, consists of the box, which contains the ticket pack; the sides of the box form the partitions between the adjacent packs and they are secured to the bottom of the box, which conforms to the back referred to in the claim of plaintiff. In this case, he has done just the same as plaintiff has in the exhibit, which is here, turned that part of the device to ninety degrees, so that the back to which these partitions are secured is at the bottom instead of vertical at the back. I consider the two constructions as being equivalent each to the other and as being equivalent to the terms of the patent claim. The claim further proceeds: "Said guide members having slots that fit over the shaft and co-operate with said slots in the end walls of said receptacle to form a support for said shaft." The defendant not using the roll, but its mechanical equivalent, a ticket pack, naturally has no need for the shaft, and of course he has no shaft which



(Testimony of Henry L. Reynolds.)

is supported or spanned by the partitions; that follows solely from the fact that he has adopted a ticket pack rather than a roll. Taking up claim 2, this reads as follows: "A ticket dispenser comprising a rectangular box-like receptacle"; that is found in both these devices and explanation of what it consists of is hardly necessary. "An inclined shelf formed on the front side of said receptacle and provided with ticket receiving grooves that are separated from each other by ribs and that communicate with the interior of said receptacle by means of slots formed at the end of said grooves." An inspection of each of these devices, plaintiff's and defendant's show that the element in its entirety, the ticket receiving grooves are there; they are separated from each other by ribs and they [61] communicate with the interior of said receptacle by means of slots formed at the end of said grooves, meaning, of course, the inner end of the grooves. The next element is: "A transparent plate adapted to rest on said ribs and cover said grooves whereby the tickets in said grooves will be visible." That is found in identical relation and condition in each of these devices. "A shaft supported transversely of said receptacle and adapted to have ticket rolls placed thereon." As I have explained before, the use of the ticket pack, which is the equivalent of the roll in the one case, makes the shaft something which may be dispensed with. This follows because of the equivalent construction used. "A removable side provided in said re-

(Testimony of Henry L. Reynolds.)

ceptacle." Both parties have a removable side. This is essential in order to be able to obtain access to the interior for placing new rolls in and for other purposes. "Guide members carried by said removable side, and adapted to the inserting between said rolls to hold said rolls in spaced apart relation." As I pointed out before, these partitions which are the guide members of plaintiff's device referred to in the defendant's device are represented by the box which holds the ticket pack; that is, the defendant's device perform the identical function of these parts in plaintiff's device. "A guide over which the tickets may pass from said roll in said grooves." The guide in the plaintiff's device is the small round bar, not a roll, because it does not revolve, but otherwise might be called a roll. In the defendant's device, he has made this bar not of just the same round shape, but the tickets are drawn over this, and it functions in every way identically the same as the device of plaintiff. The question as to whether this is round or flat at the point where it is engaged by the spring dog is immaterial. It simply provides a table or resisting element there against which the spring may act to hold the ticket against return. The next element is "and tension devices engaging said tickets, the said tension [62] devices permitting said tickets to be withdrawn from said receptacle but preventing said tickets from being pushed back into said receptacle." In other words, the meaning of that is tension devices which will produce the function stated

(Testimony of Henry L. Reynolds.)

there, namely, permit said tickets to be withdrawn but preventing them from being pushed back into the receptacle. This is done in plaintiff's device by a spring dog which has been made by using an ordinary spring wire paper clip. In defendant's device, this is represented by the flat springs. In the patent of plaintiff, this tension device is represented by a dog and spring acting upon it. In other words, in the device as shown here, these two parts as shown in the patent have been combined into one, without in any way changing their function or manner of operation, and this I believe to be a true and permissible equivalent. The function of this advice, the results secured by it are the same, both in the patent and in each of these boxes shown here."

"Question. Then to summarize, Mr. Reynolds, state to the Court whether or not you find in the defendant's device, Plaintiff's Exhibit 2, the elements of plaintiff's patent?"

"Answer. I do."

#### Cross-examination.

I have examined the Shoup, No. 286,493, Springsteen, 632,070 and Whitaker, 127,722, patents. All of the patents show a receptacle or container for the mechanism employed and an opening through which the tickets may be projected.

I have also seen and examined the patent of C. L. Davis on Ticket Case or Holder granted May 31, 1892, No. 476,005, and the patent to O. Oehring on Ticket holder granted December 6, 1910, No. 978,-

(Testimony of Henry L. Reynolds.)

052, both showing the *the* auxiliary between a roll and packs of tickets as existing at a date prior to the Dwyer patent.

Looking at defendant's device, the end walls of the [63] device are each provided with a slot but no shaft is inserted in that slot. Instead of the shaft we find a plate or bar, flat bar, which carries the spring dog, but there is no shaft in it. There would be no purpose in introducing into the side walls of the case slots to carry a shaft which does not exist. In the defendant's device there is not identically the same element in appearance and construction, as the ones defined by that part of the claim for plaintiff's device. The Dwyer patent specifically states that the partitions are fixed to the removable back wall. The defendant's device has no back wall which is fixedly fastened to the partitions, that is, the back wall I mean, a portion of the outer casing. That is possibly what is meant by "a removable [64] back wall" in claim 1 of the same patent. The next element in the same claim provides: "Guide members having slots that fit over said shaft and co-operate with said slots in the end walls of said receptacles to form a support for said shafts." That has reference merely to the little parts that are cut away in the partition walls of plaintiff's device, so as to adapt them to be inserted over the shaft which carries the rolls of paper. The defendant's device having no partitions, necessarily has no slots in partitions of this kind. The Whitaker patent of 1872, looking at Fig. 5, provides a tension de-

(Testimony of Henry L. Reynolds.)

vice of some kind which, in one position, will function to prevent the ribbon being drawn back. The Shoup patent 286,493 of 1883 has a glass plate covering the exposed part of the ribbon and looking at Fig 2, it also has a roll acting upon the ticket strip to prevent their turning backwards. [65]

In the patent granted to Mr. Dwyer there was contained a specific element in each claim a removable side referring to the back wall of the casing.

There is nothing in the Harbaugh box which is similar with regard to partitions as *as* the construction shown in the Dwyer patent. [66]

**Testimony of Charles S. Goldberg, for Plaintiff.**

CHARLES S. GOLDBERG, being duly sworn, testified for plaintiff as follows:

I live in Portland. I am an attorney at law and consulting engineer and specialize in patent practice and have been so engaged since 1917. I have had experience in mechanical engineering work for twenty-five years or more, and have been engaged in the study and interpretation and construction of patents. I have examined the patent at issue in this case, that is, Dwyer's patent, and have also examined the two devices here referred to. That is, plaintiff's device and defendant's device. This has been brought somewhat suddenly upon me but I think I am sufficiently familiar to express an opinion on it, as to whether the defendant's device contains the elements of the claims of the Dwyer



(Testimony of Charles S. Goldberg.)

patent and whether it is substantially the same as plaintiff's device. I will say that in the defendant's patent we have an outside case which supports the tickets and we have the opening through which the tickets are drawn by the buyer and as an essential element of this, I would regard a means of preventing such tickets from being returned to the receptacle from the box. This would be the essential characteristic, as far as I can see, of the defendant's patent. I should say that the elements of the claims of the Dwyer patent are contained in the defendant's device in their entirety. The functions of the partition in the plaintiff's device are simply to prevent the tickets from interfering with each other, in the process of pulling them out. They are merely as a guide in pulling the tickets out. I find the same functions performed in substantially the same way in defendant's device. By partition walls which are very similar to the partition walls in the plaintiff's device, except that the partition walls are in the shape of boxes which rest on the bottom of the device. As a patent expert, I will say that it is not material or essential, under the patent, for these partitions to be affixed to the rear. [67]

#### Cross-examination.

In the Harbaugh device there is no removable wall which had partitions affixed to it, and which is an element in the language of claim 1 of the Dwyer patent.

**Testimony of Paul Harbaugh, in His Own Behalf.**

PAUL HARBAUGH, defendant, being duly sworn, testified:

“Question. Did you sell any of that merchandise upon which you got a commission to or through Mr. Enloe, the defendant in the other case?

Answer. Yes, sir.

Question. Then you were acquainted with Mr. Enloe, that defendant?

Answer. Yes, sir.

Question. You sold for Mr. Holsman merchandise to Mr. Enloe, to be sold by means of his Silent Salesman, this device?

Answer. Sold him merchandise for whatever purpose he wished to use it.

Question. And you got this idea, Mr. Harbaugh, for using your device, whether it is the same as his or not, from the one—from having seen Mr. Enloe and the plaintiff in this case selling merchandise by means of this device, isn't that right?

Answer. Probably.

Question. Now, that is a fact isn't it? That you had never seen it before until you saw either the plaintiff or Enloe's, isn't that a fact?

Answer. Yes.

Question. Now, Mr. Harbaugh, you had sold for Mr. Holsman a considerable quantity of merchandise through Mr. Enloe, by means of his Silent Salesman, hadn't you? Answer. Yes.

Question. And when he was enjoined by the

(Testimony of Paul Harbaugh.)

Court, it cut off a considerable source of revenue for you, didn't it?     Answer.   Yes. [68]

Question.   Then you took this device and started to see if you and Holsman couldn't work out something of it for yourself. Isn't that right?

Answer.   Something of that nature, yes.

Question.   Now, as far as new business was concerned after this preliminary injunction was issued, instead of putting out this same box, this same kind of box which was introduced in evidence as Plaintiff's Exhibit 2, you built another kind of box, didn't you, with which you supplied all the business you have been able to get?

Answer.   Yes.

Question.   And as you said yesterday, you had never seen this device used or any selling of merchandise by a device of this kind until you saw the Dwyer and this Enloe device?

Answer.   That is correct.

Question.   And that is where you got your idea?

Answer.   Yes, sir.

On certain of these tickets there is printed an order for merchandise of greater value than the ordinary ticket bears. The purchaser runs the chance of getting a bonus on a given ticket. The object of not having it go back into the machine is that a purchaser might try to look two or three tickets ahead and see [69] whether he is going to draw a bonus on his next. There is a valuable piece of merchandise given with every ticket. The pur-

(Testimony of Paul Harbaugh.)

chaser knows when he buys a ticket exactly what he is getting, but he does not know what he will get the next time. Each transaction is technically complete in itself and actually there is a matter of chance connected with it, the chance to pull the next ticket if he desires.

COURT.—The purchaser of all tickets receive the same quantity of merchandise?

Answer. No, sir; some receive articles of greater value than others.

COURT.—There is, then, a question of chance.

Answer. Well, that is a rather involved question.

COURT.—I mean as a matter of fact.

Answer. As a matter of fact, there is, yes.

COURT.—There is more or less of—well, we might say, perhaps not accurately, but for the purposes of this case, more or less of a lottery connected with it?

Answer. Yes, it is actually a substitute for the punchboard, which you have seen, probably.

COURT.—The purpose of the mechanism that prevents the pushing back of the ticket is to prevent the customer from knowing what is on the ticket?

Answer. Yes, following.

COURT.—That he doesn't get?

Answer. Yes, sir."

COURT.—If the ticket exposed for instance shows a five cent ticket and a collar button he would get a collar button if he pays the five cents?

(Testimony of Paul Harbaugh.)

Answer. He knows he gets the collar button, and a chance to pull the next ticket if he desires.

COURT.—But if the next ticket shows a collar button and [70] a camera or some other merchandise he would then have a chance to get the next ticket for five cents and get the merchandise?

A. Yes, sir.

COURT.—And that is simply continued as long as he is willing to buy a ticket? A. Yes, sir.

Mr. SKEEL.—I simply wish to say this on that question: that this device has been held not to be lottery or gambling device of any kind, if that is the question in the Court's mind.

COURT.—It occurs to me now that inasmuch as it has that feature whether it is such a character that a court of equity would care to enjoin someone infringing it.

I have authorities on that subject. I would also like to say that this apparatus itself has been specifically held by the court not to be a lottery or gambling device.

**Testimony Taken Before Robert F. Maguire,  
Master in Chancery.**

Testimony Taken Before ROBERT F. MAGUIRE,  
Master in Chancery, February 2, 1922, Under  
the Order of Reference.

The plaintiff was present in person and represented by his counsel, Barnett Goldstein, Esq., and the defendant Paul C. Harbaugh was present and represented by his counsel, T. J. Geisler, Esq. [71]



(Testimony of Paul C. Harbaugh.)

The following stipulation was dictated by counsel and agreed to by the parties present:

IT IS HEREBY STIPULATED by and between counsel for the respective parties hereto that the defendants at this time will not urge and do now abandon that part of the petition for damages which seeks to recover the sum of two thousand dollars for deterioration of merchandise and the sum of five hundred dollars for attorney's fees.

**Testimony of Paul C. Harbaugh, in His Own Behalf.**

PAUL C. HARBAUGH, was sworn as a witness and testified on direct examination:

I am twenty-eight years old. I reside in Portland, Oregon, and am in retail jewelry business. In the early part of 1919 I operated the General Novelty Company. I was the owner; merely assumed that name. I was engaged in the business of selling merchandise in which I used the box Plaintiff's Exhibit Number Two.

An assortment of merchandise accompanied the box and some of it was in the box, and there was a ticket which designated the item of merchandise bought. The tickets were purchased and presented to the dealer or his clerk and the item of merchandise claimed.

I made two hundred of these boxes. The merchandise sold by these boxes consisted of quite a large assortment, for the most part mounted on a pad, something on this order. (Hands picture to counsel.) Attached to this picture is a list show-

(Testimony of Paul C. Harbaugh.)

ing the articles in that assortment. The three pictures attached together as one exhibit marked Defendant's Exhibit 1.

There will be no claim of damages on behalf of any of the other defendants because Mr. Harbaugh is the only one injured by the injunction.

There was an assortment of the merchandise delivered with each box. The assortment and the tickets in the box corresponded with each other. I made the selection of articles for the assortment. [72] The value of the assortment varied between thirty and fifty dollars. The box cost \$2.50. I sold the assortment of merchandise to the dealer for \$150, less thirty per cent commission usually. These assortments were placed on consignment with the dealers and he was allowed thirty per cent for such sales as he made. In placing these boxes with the dealers the salesmen called on them and either placed them in person, or took orders to be shipped. The names of my salesmen were Paul Enloe, Sam Flatow, Ben Levin, L. Rubenstein, M. Schultz and Joseph Schnitzer and some others. Mr. Rubenstein, Mr. Levin, Mr. Enloe and Mr. Schultz did most of my work. All of them except Mr. Schultz lived in or about Portland. Mr. Schultz lives at Fort Dodge, Idaho, I believe.

We had what we called a salesman's record, kept on sheets, on which each assortment that we placed was entered. These are the sheets. They are in the handriting of Winnifred Sullivan. She was

(Testimony of Paul C. Harbaugh.)

my bookkeeper. Her name is now Mrs. Morris Minsky and lives in Seattle, Washington.

I instituted the system for keeping account of these transactions. The entries were made by the bookkeeper under my direction. By refreshing my memory from these record sheets I can testify as to each transaction I had with these boxes or merchandise. These record sheets relate to the year 1919.

Sheets received in evidence providing some connection is subsequently made of identifying the actual transactions, or illustrating the testimony of the witness.

The months of February and March as given on these entries refer to 1919. Some of the handwriting, the headings, are mine.

Mr. GOLDSTEIN.—I have got to object to the sheets being offered in evidence because they have not been properly identified by the party who made them.

What was done in your business, if you know of your own knowledge,—how were the entries posted in your books which you [73] kept, sheets or whatever they may have been?

As each assortment was shipped out, the entry was made on these record sheets, and also entered on a card. The entry on this sheet in most cases was made from the original order. I have such original orders here. They are all contained in these files.

The MASTER.—Mr. Harbaugh, have you taken

(Testimony of Paul C. Harbaugh.)

the original orders and checked them with each of the entries upon this record that you have been referring to?     Yes.

The MASTER.—Are there any entries appearing upon these records for which you have not got the original orders in this file?

Yes. In some few cases I did not receive any signed order, simply a verbal order, or an order by letter which was not kept with this file or with the form orders. Then also these have all been in storage and all these records are badly mixed up and I feel pretty sure that some of them have been lost.

I have personal knowledge that every one of these entries of goods shipped were in fact made, and the goods put in the hands of these particular purchasers. I know that from my own personal knowledge and observation. These sheets are segregated by the salemmen's names. If an order was taken by Mr. Enloe, when it was shipped the entry was made upon his sheet, and the same with the other salesmen. The opposite side is a record of receipt of money from the dealer applying to these assortments. I know that the sums of money received and recorded here were received from these individual dealers whose names appear here.

There were other advances or expenses paid in connection with each of these items than appear under the column of advances and expenses.

Mr. GOLDSTEIN.—You are aiming practically to show the [74] entire record here?

(Testimony of Paul C. Harbaugh.)

Mr. GEISLER.—Yes.

Mr. GOLDSTEIN.—I would have to object to that as not competent to be used by this witness. He does not know anything about it of his own knowledge except what somebody told him.

Mr. GEISLER.—I am trying to make all the short cuts I can. Of course I can go through each transaction separately.

The MASTER.—For instance we have here the names of the dealers who purchased the goods and the names of the salesmen who took the orders and the money received. Do you know the goods were sent to the dealers named? Yes, I know that.

The MASTER.—For instance we have the names of dealers and places, and the salesmen who took the orders and the money received. Do you know the goods were sent to the dealers named?

Yes, I know that.

The MASTER.—For instance we have the names of dealers and places, and the salesmen's orders, and the entry of the money received; do you know that that money was received from that customer?

Yes, I know that.

The MASTER.—If he knows these matters I do not see how we can keep this out. I do not see why he could not testify from it.

Mr. GOLDSTEIN.—Do you mean to say you can now remember that you got the money set out alongside of the names as it appears here?

Yes.



(Testimony of Paul C. Harbaugh.)

Mr. GOLDSTEIN.—How can you remember that. I know we received the money.

Mr. GEISLER.—Under whose directions were these entries made? [75] Under mine.

Mr. GOLDSTEIN.—The only way he knows the money was received is because it appears on that sheet.

Mr. GEISLER.—He may have an independent memory also.

The MASTER.—Is there going to be an offer of this?

Mr. GEISLER.—I am going to offer it for the purpose of showing the number of boxes which were sent out to dealers during the period when the business was first started and ending with the time when the injunction prohibited him from doing further business.

Mr. GOLDSTEIN.—And I will object to the offer on the ground that the record has not been properly identified, in that it was not made by this witness, and furthermore, according to the testimony of the witness his knowledge of the transactions is dependent upon hearsay evidence and what appears in the record not made by him.

The objection was overruled and the sheets received and marked Defendant's Exhibit 2.

The expenses connected with the making of these sales outside of the commissions paid to the dealers; explained in detail were maintaining an office, salaries of bookkeeper and assistants who made up the

(Testimony of Paul C. Harbaugh.)

assortments, express charges, stationery and such items as that, and the commissions paid to the salesmen, which were 15% of the amount received. We kept a list of all moneys paid out for expenses and at the end of the month entered them in the journal.

When an assortment was shipped out a record was entered on the salesmen's commission sheets and also on a card which was placed on a card index. The salesmen's commission sheet is marked Defendant's Exhibit 2. These are the cards. These two entries were made approximately at the same time.

Cards marked Defendant's Exhibit 3. [76]

I got the information for making these entries on the commission record and on these cards, from the original order or memoranda of shipment. These original orders are in this box here.

The original orders in the box received as Defendant's Exhibit 4.

I know of my own knowledge as to most of these orders in this box marked Exhibit 4 being filled. I am able to tell which of those orders had been filled by looking at the salesmen's record. I know of my own knowledge that each one of these orders which is specified here on Defendant's Exhibit 2 was filled. There were cases where they were returned later without being used, but those returned were noted on the record by the explanation "Did not use," or "returned" or some such, written opposite to the particular name of the dealer and in alignment to the dealer's name.

(Testimony of Paul C. Harbaugh.)

I know the net profits that my business realized from the boxes put out prior to the date of the preliminary injunction approximately. I ascertain that amount by deducting from the receipts all expenses, which left the net profit. I have a record of the receipts, but the expenses have to be estimated, in a number of instances. The receipts were entered in the salesman's record sheets, also in the journal.

This journal was received in evidence as showing the receipts from these boxes and the merchandise sold, and marked Defendant's Exhibit 5.

The expenses consisted in a number of items. First, I estimated the cost of the merchandise that was sold at 50 per cent of the receipts as a maximum; it would actually be considerably less than that. Then there were commissions to salesmen. They are arrived at from the information on the salesmen's record sheets. When paid there would be an entry of the amount and to whom paid on the commission's record sheets. They were also entered in the journal at the end of the month; the total was entered in the [77] journal.

All other expenses were grouped. Rent and light and office expense, such as bookkeeper's salary and workmen's salaries, stationery and the like. Record was kept of them and the total entered in the journal at the end of the month. I have only the total for each month, so in arriving at the estimated expenses for the period of forty-five days I took seventy-five per cent of the total amount for the

(Testimony of Paul C. Harbaugh.)

two months, which gave me the approximate expense, as near as it could be arrived at for the forty-five days.

Ledger received in evidence and marked Defendant's Exhibit 6.

I will trace through the whole account of W. M. Crouch, Oakland, Oregon, so as to inform the Court of the mode in which I kept my accounts with respect to these sales, and how I arrived at the final net profit made.

An order was taken on February 25, by P. V. Enloe, the salesman. That order was shipped and entry made in the salesmen's record sheets showing the assortment number, and the address of the consignee. There was also an entry made on a card in the file. The order shows the kind of assortment of merchandise sent to that man by number, assortment No. 101. These assortments were identified by the salesman's card—we had standard assortments that were numbered and the salesmen carried a number of them and we also had a similar one in the office; when an order came in for an assortment No. 101 we made one up of the duplicate we had in the office and shipped it. We had a great number of these kind of assortments.

I had a record showing the actual cost to me of each assortment. There was only one class of assortment sold during this period, and in that particular we sold Assortment No. 101, of which I have a record here some place.

(Testimony of Paul C. Harbaugh.)

The picture there, showing that this assortment No. 101 [78] cost \$36.30 for the merchandise, which, however, did not take into account the collar buttons. Took in everything else. The collar buttons were always the same amount.

There were three thousand collar buttons to each assortment. These cost two dollars a thousand, thus six dollars for each assortment. In addition to the other specified items the real fact was that each assortment only used approximately five hundred collar buttons, because the customers didn't take them.

In figuring we cannot say how many less there were, so there will have to be added to \$36.30, six dollars for collar buttons. That would make the total cost \$42.30.

I made up the first assortment and then had the workmen copy it. I personally am acquainted with all prices of the goods and am able to testify positively at this time as to my own knowledge of these assortments within a limit of variation. In making up my estimates I placed the cost for each assortment at not over fifty dollars. The actual cost was less in each instance.

### **Testimony of Louis Rubenstein, for Defendant.**

LOUIS RUBENSTEIN, a witness called on behalf of the defendant, being duly sworn, testified on direct examination.

I live in Portland, Oregon. Aged 43. My present business with the Goodyear Raincoat Company



(Testimony of Louis Rubenstein.)

in this city. I know Mr. Paul Harbaugh, yes sir. In the early part of 1919 he was with Mr. Holsman in the wholesale jewelry business, and punchboard.

Mr. Harbaugh carried on the punchboard business under the name General Novelty Company. I was connected with that General Novelty business as traveling salesman. During the early period of 1919; started in 1918, I believe I started in the fall of 1918 and left there about August, 1919. I was in the employ of Mr. Harbaugh during January and February and March of 1919. I know about his putting out boxes called Merchandise Vendors. I recognize this as such a box (referring to Plaintiff's Exhibit No. 2 in the District Court). [79]

In connection with that box I used to go on the road, taking orders for the punchboard—whatever it is called. It is a board with merchandise on it and I used to have to sell these orders and those were the boxes that were furnished with the orders.

When I made a sale the dealer to whom I made the sale used to sign the order that I would make out. The sale to the dealer was made on commission basis consigned to him. The original of that order which I took that way and which the dealer signed used to go into the house and I used to give the dealer a copy of it.

I could not say exactly the method in which the salesmen's accounts were kept by Mr. Harbaugh, but there used to be a system that I remember—when I came in off the road I would want to inquire into certain accounts, whether such accounts were

(Testimony of Louis Rubenstein.)

shipped, or whether they had run out and possibly re-ordered—there used to be a card list I remember the girl used to go to, that is the bookkeeper, Mrs. Minsky.

The MASTER.—Turn to Mr. Rubenstein's account if you want to.

Mr. HARBAUGH.—These are not listed under his name, they are under the head of the office, because he wasn't on a commission basis.

This is my territory right here. George W. Baker, Centralia, Washington. March 8, 1919. Clampitt Brothers, Chehalis, Washington. March 8, 1919. Fred Bleachwood, Aberdeen, Washington. March 10, 1919. Bleachwood, Aberdeen, Washington, on March 11, 1919. Ed Loff, Hoquiam, Washington. George Heath. This was on March first, Kennewick. Cross & Leonard, Montesano, Washington, on March 3. Carroll & Ford, Elma, Washington. The dates on the last ones, Cross is on March 3 and Carroll & Ford on March 13. Then there is J. B. Putman, Hoquiam, Washington, on March 13. Jack Nitkey, Harrison, Idaho, on March 14. Had a lot of trouble [80] with him, I remember him well. H. A. Kolb or Kalb; that is as near as I can get it; Raymond, Washington. The last two are on March 14. This is also March 14. A. Willis, Raymond, Washington. On March 15, Sklodo Brothers. At Cosmopolis, Washington. On the same date Morris & York, Kelso, Washington. March 15. On March 17, J. E. Steinberger, Toledo, Washington. L. J. Bright, Castle Rock, Washing-

(Testimony of Louis Rubenstein.)

ton, on March 17. On March 18 Peden & Miller, Garfield, Washington. Under March 19, Clampitt Brothers, Chehalis, Washington. There is one account I don't just remember the name, but that was in my territory, Colfax, Washington; C. A. Morley; either the name is changed here or I have lost track of the name. I don't remember that name. Charles Amos, Troy, Idaho; this is under March 25. March 29, Brown & Morrison, Yakima, Washington. March 29, Sharp & Turner, Lewiston, Idaho. Under the same date H. E. Kepler, Lewiston, Idaho. Under the same date Sprague & Long, Yakima, Washington. Under March 28, E. S. Mauk, Winchester, Idaho. George N. Heath, Kennewick, Washington; this is March 26. In each of these cases I got a signed order from the parties. In each case I delivered a full assortment of merchandise with the boxes; the latter like Plaintiff's Exhibit 2 in the District Court. I also refilled a great many orders. If the order wasn't quite finished, I would take a new order and take that back and allow whatever merchandise there was on there; or else let them run that out and in the meantime send a new one; and in many cases I have taken more than one order from the same firm. I might not get around in time before that order was gone; some of them used to do more business than others.

I collected in all cases as long as I was on the road. I continued to do business for Mr. Harbaugh, I believe, until July or August, 1919.

(Testimony of Louis Rubenstein.)

I remember about an injunction being served on Mr. Harbaugh. When I came in from the road they told me I was in [81] with the rest of them, that I would go to jail for the infringement of the box. I was a party defendant in that injunction suit. After this injunction had been issued I placed a large box, a round one, on the road. That is the very model of it. (Referring to Defendant's Exhibit No. 7, introduced without objection.)

This box here, the round box, was not received with the same favor as the original box by the dealers. There was objection to it for several reasons. The first objection was that it was large, it would take up too much space; usually kept these boxes on a showcase or cigar case or somewheres in the front where they could be seen, in order to get the customers interested in playing it, and when we put the other one on they complained it was too large and was taking up too much space. That is one of the main reasons; bunglesome. The placing of the new box to my knowledge affected the subsequent trade, after the injunction in this way, that they kept on telling why I didn't give them the old box, it was smaller sized box, less bulk. They could see all the numbers right in front of it. In lots of cases they would possibly pull on a certain number and after they had spent, say ten or fifteen tickets they would be pulling on, they would figure there must be a price about due. By turning this large box they would lose the number they had been pulling on and they would not know

(Testimony of Louis Rubenstein.)

whether that was the same one or not, and in that way it wasn't satisfactory. They claimed that the round box, Defendant's Exhibit 7, was used to mislead the customer.

The business began to fall off. The customers wanted the other box back again, and eventually they drifted back to either that one or one similar to that. This one here I recognize, I used to see this box here a great deal; the Bargain Box. (Referring to the plaintiff's box marked Plaintiff's Exhibit 3 in the District Court.)

They would replace our round box with those other boxes. [82] And in a great many cases they told me they liked my merchandise better, the board which the merchandise was displayed on, but they didn't like to keep the box, Defendant's Exhibit 7, on the show case.

#### Cross-examination.

That was the only reason business fell off, the use of this box; not because of police interference.

In some cases when I came into the office I was told that a certain party would not have another one of those outfits because of police interference. I came in contact with that objection right from the start when I began operating with the General Novelty in the Fall of 1918, in some places. In some places that continued right along.

"Well, when you came in didn't you tell them a certain party would not have another one of those outfits because of police interference?

Answer. In some cases.



(Testimony of Louis Rubenstein.)

Question. Well, did anybody refuse to take any because of police interference?

Answer. Well, not very much.

Question. Well, did any?

Answer. Well—

Question. Say yes or no.

Answer. Yes.

One case I remember Castle Rock. It seems to me in Pendleton, Oregon, there was one case. I think I remember one case in Raymond, Washington. No, I remember Raymond didn't have them; when I started they didn't have them, the merchants were afraid to have them, on account of police interference. On the second trip I was there each merchant had all the way from one to three different novelty boxes from different firms. That is the [83] case of Raymond. I remember Raymond, I remember I had a little trouble the first time I was there, they would not handle them. The first time I was there would be in the early spring 1919. The next time I found them there was maybe thirty days later. I placed orders there then. I sold quite a few there until I believe that the police stopped them again.

I could not tell at any time when the police would step in and interfere with the operation of these boxes; that was a chance I was always taking with my business in every town I went to in the State of Washington and in every town in the State of [84] Oregon. That was the chance I had of getting any business, whether or not the merchants

(Testimony of Louis Rubenstein.)

would care to risk the chance of police interference.

“Mr. GOLDSTEIN.—At this time I will ask that the defendant produce a letter from Fred Blackwood, Aberdeen, Washington, under date of July 9th, advising to the effect that the boards were stopped by local authorities. Also a letter from H. A. Kalb, Raymond, Washington, under date of July 1, 1919, advising that the city officials were looking into gambling devices.

Mr. HARBAUGH.—I cannot find any of the correspondence of that period, but I do remember some such letters being received, and if you can give me the cards I can refresh my memory by them, but I know several such letters were received at different times.

Mr. GOLDSTEIN.—I show you a card from L. L. Fisher, Kelso, Washington, upon which there appears a notice, “Rubenstein advised Kelso closed temporarily,” and ask you if that refreshes your recollection.

Answer. Possibly it does; I could not say, because, as I say, we had that right from the start, at all times. (Referring to police interference.)

I don't remember when it was that I first came back to Portland and found out that an injunction had been secured restraining us from operating with these boxes.

I think it was at least two or three weeks before the round box could be made up. We had a terrible time getting the shop to make those.

(Testimony of Louis Rubenstein.)

There appears on office sheets record marked Defendant's Exhibit 2 the following notation: Sale on March 29, to Brown and Morrison, Yakima; March 29, Sharp and Turner, Lewiston, Idaho; March 29, H. E. Kepler, Lewiston, Idaho; March 29, Sprague & Long, Yakima, Washington. I don't know whether I received any instructions on that trip or not in respect to securing back those boxes from those people. The method was to place these boxes on [85] consignment with the merchants, after the merchants disposed of the merchandise they would then secure additional merchandise or return the box.

The efforts that I made about calling in those boxes was whenever I was there I would take the box and pack it up and ship it back. I did that as soon as I was notified, when I went out with the new order; when that was I don't know. I was instructed to do that immediately upon my return from the road, after the injunction was issued, to call in any of the boxes that were outstanding.

I would not write letters to the General Novelty Company explaining why I could not do business with certain parties [86] because of police interference. I would not complain, I would go out and grind, if I could get them I would and if I didn't I didn't. There was nothing sure because of this police interference. That was so from the start and the police interference never stopped.

There are 3000 five-cent tickets in one of these boxes.

(Testimony of Louis Rubenstein.)

The merchants would not return any of the collar buttons they could not sell. We would not ask for them and we would not get them.

These merchants were told that after they sold all the three thousand tickets and disposed of and secured \$150.00 in that way, they could retain one-third as their commission, forty-five dollars, and all they were required to remit was \$105.00.

In a few instances the people to whom I sold these boxes and outfits could not sell their entire quota of tickets, or three thousand tickets and they would return us the balance of the merchandise on hand with the cash received.

The time required to make the sale would depend on the trade the merchant had, some places maybe would sell two a week, some places maybe one a week, and some places maybe one a month. One could not tell to a certainty how long it would take a man to dispose of his stock. It depended on how the town was moving, whether there was any work going on for these loggers or other people who attended these places, or whether the police let the matter be without interference.

The merchants with whom I ordinarily deposited these boxes were cigar-stores, candy-stores, soft-drink houses. A great many of them soft-drink houses and poolrooms; where there were boys hanging around. It depends upon the boys that hang around these places that spent the money.

These boys didn't expect to buy a collar button for a [87] nickel. They expected to get some-

(Testimony of Louis Rubenstein.)

thing big, a camera or something. That was the chance they were taking. A fellow would keep on pulling these tickets until he struck something big, before he quit.

When I made my second trip, in the event they had not disposed of the outfit I would take what cash they had secured, less the commission, and let the box stay there until they got rid of the merchandise. I took some home with me after the injunction was served. I don't know how many.

I was employed by the General Novelty Company. Mr. Harbaugh was the man in charge. I don't know who else was interested.

I first began to sell these boxes I think in January or February, 1919, for the General Novelty Company. I received Fifty dollars a week straight salary. I wanted commissions at that time, but the business was too good, they would not give me commission. I asked for commission when I started selling these boxes, referring to Plaintiff's Exhibit 2. I wanted to work on commission. I spoke to Mr. Harbaugh. I got fifty dollars a week, and that continued until I was fired by Mr. Harbaugh, about the latter part of July or the first part of August; I made arrangements with another concern and I went to work there the fifteenth of October.

When I was disposing of Defendant's Exhibit 7, selling those, I had the same assortment of merchandise with them as I had with Plaintiff's Exhibit No. 2 as I remember.



(Testimony of Louis Rubenstein.)

Well, there were complaints about that box No. 7, that it did not work as good as No. 2. They would get hold of the ticket and possibly pull fifty cents worth or a dollar's worth and the others would tear off and turn the box and they would lose their place; and then they could pull the ticket out so much easier and see there was nothing in view but the collar buttons [88] and they would quit right there, or possibly push it back again and the attendant could not see.

I was receiving thirty-five dollars from Holsman before I went to work for Harbaugh.

When I was getting thirty-five dollars a week I had no devices or boxes, or a punchboard, or any sort of a scheme to dispose of that jewelry. That was selling jewelry straight, carrying samples, sample cases.

I got my merchandise from the General Novelty Company in the Phoenix Building. Holsman's office was on the same floor. The merchandise was stored in Harbaugh's office, in the General Novelty Company.

I carried just an order book. The assortments were made up in the office as they wanted to except in some repeat orders. Two or three cameras would go with these assortments. A great many of the numbers had collar buttons on them. There was more than the cameras on that board; there was all sorts of merchandise, altogether about twenty-five, and there would be 2975 collar buttons. There is an example right there. I don't know how it would

(Testimony of Louis Rubenstein.)

figure. I know it was a large board, with a lot of merchandise.

I could not tell in advance of going out on the road just how much business I would do. It was all a matter of chance.

There was the same police interference with these boxes No. 7 as there was with this Plaintiff's box No. 2. I would not tell just when a town would be closed or would be open so far as the box was concerned from the first time I began selling them until I quit in August, 1919.

The MASTER.—Does counsel contend that the interference of the police determines whether a thing is a gambling device or not?

Mr. GOLDSTEIN.—No, but I do say that the interference of the police would make it a matter of possibly a conjecture as to [89] the amount of profits to be obtained. In other words, it is too remote and conjectural, where it is dependent upon the possibility of police interference. Do you get my point?

The MASTER.—I get your point.

I know a man by the name of R. D. Enloe. He had some trouble with the police authorities here—about the same sort of a device at the time I started, sometime in December, 1918.

**Testimony of Paul C. Harbaugh, for Defendant.**

PAUL C. HARBAUGH testified on direct examination.

Each salesman's orders were entered on his sheet (Defendant's Exhibit 2.) The top of that sheet would be inscribed with the name of the salesman. A notation was made on a card that was filed in the card index under separate states and towns, and such a notation was made on the card which I have here.

The paper identified was offered in evidence as Defendant's Exhibit 9.

The purpose of making the entry of this transaction on the commission record was to keep a record of the commission accruing to the salesman. Paul Enlow worked on a commission. That record shows how much commission he received for this particular transaction. It shows only the total commission that he received. The method of paying commissions was to total the receipts, and at any time that he made a demand for settlement we would pay him his commission on the total amount coming to him. The commission was not paid separately on each sale. The records show that all commissions due him, including the Crouch commission, were paid, after collection of the money from the merchants. The purpose of making my entry on this card which I kept in the card index file of the Crouch transaction was so we could have a sort of handy reference, an index under the towns and

(Testimony of Paul C. Harbaugh.)

localities. For instance if a salesman was going through Oakland, Oregon, we could tell at a glance who the dealers were in that town that he was to call on. And by means of that card [90] index I was able to locate the places where my merchandise boxes were located.

Continuing on through with the entries made with respect to the Crouch transaction: When the money was received an entry was made on the commission record sheets, and that appears here in the Crouch transaction under date of March 18th showing that \$95.00 was received.

There was no regular custom in regard to the payment by the merchants of the amounts due from them; they paid when they got ready and when we could collect it.

The general practice was that the salesman on his following trip, after the sale made an effort to collect it if it had not been paid before and at the same time sell him a new one. In many instances, however, he was not able to collect. They would not pay, offering some excuse, and we would have to wait until the next time, or probably we would solicit payment by mail. Some times considerable time would elapse before I got my money from a transaction.

Continuing further with reference to this transaction, an entry was also made in the journal of the amount received. That entry appears on page 2 of the journal. The name "Crouch" does not appear

(Testimony of Paul C. Harbaugh.)

in connection with that entry, merely the amount. Merely totals were entered in the journal.

I would be able to determine the net profits I made out of that transaction by deducting all the expenses from the amount of \$95.00. The expenses could not be determined except in specific instances. They could be approximately, however.

I am able to state the amount of net profits that I made out of this business from the time of its beginning until the time I was enjoined from the use of these boxes. I have prepared a statement showing such net profits. I prepared that statement [91] by using the salesman's record sheets, the journal and the ledger.

Mr. GEISLER.—I would like to offer this in evidence for the convenience of the Court so he may be able to determine without taking each figure down as the statement is made.

Mr. GOLDSTEIN.—There is no objection as a means of convenience for the Court illustrating the statements of the witness, but not as to its accuracy or correctness of the items and the method used in arriving at it, or as the original record.

The MASTER.—It will be received as illustrating the testimony of the witness and not as an original record or as evidence of the facts contained therein, marked Defendant's Exhibit 10. (Summary.)

The volume of business I did for the preceding forty-five days, I mean preceding being enjoined, was a total of \$11,266.00. That was the gross receipts after deducting the dealers' commission of



(Testimony of Paul C. Harbaugh.)

thirty per cent but without deducting the salesman's commissions. In order to arrive at the profit it would be necessary to deduct the cost of the merchandise. That was \$5,644.00. I will explain how we arrived at that. By merely deducting fifty per cent of the total receipts, that is the amount of the cost of the merchandise. That would be the maximum and would usually be considerably more than the actual cost, but that is the way we figured it. Then the commissions paid, \$1,213.19 to salesmen. That is exact. All other expense \$765.00. That was arrived at by taking the total expenses for February and March and using seventy-five per cent of that total to cover the forty-five day period. My net profits for the period of forty-five days was \$3,664.81.

We had been threatened with injunction for some time, I don't know exactly for how long, and some time before being served with papers enjoining us, I had endeavored to make up another box that we could use in case we were enjoined from the use of the [92] one we were then using. This is Exhibit 7, the round box.

Being threatened with injunction affected my business. Letters were received by our customers. Some of the customers showed me the letters they had received. I saw two of these letters. I am not able to say as to by whom those letters were signed. I don't know where those letters are. I have made a search for them but have not been able to find them.

(Testimony of Paul C. Harbaugh.)

To replace the enjoined boxes we made up a new box which our attorneys advised us did not infringe on any patents and we put that in use. I attempted to put out that new box in California in the vicinity of San Francisco, but had no success at all. I found the dealers were using Mr. Dwyer's box put out by a concern under the ownership of R. H. Enloe in that territory, and we could not get our box in at all. The objection of the dealers to the use of our new box was they did not like it as well as Mr. Dwyer's. The cost of these new boxes was five dollars each. I had two hundred made. I endeavored to continue my business after the injunction was served up to January, 1920. Then I discontinued trying to put out any boxes because it was unprofitable. We were not doing enough business to make it pay. Our receipts steadily dwindled and we were operating at a loss.

In some instances the merchants received these circular boxes and used them but there was a general disinclination to use them because of their bulk and other objections they had to them. I made a computation as to the way in which our business fell off after the injunction. It is included in Exhibit ten.

In April our receipts dropped to \$2,684.56 and our net profits to \$470.29. In May the receipts from the business were \$4,239.83 and the net profits \$310.36.

This exhibit is based upon my knowledge gathered from the books. Receipts from the business done in June \$1,620.27, net loss of \$318.27. All these months

(Testimony of Paul C. Harbaugh.)

were in 1919. Receipts from business done in July \$360.34 with a loss of \$172.64. Receipts from business done in August \$822.32, with a profit of \$133.75. [93] Receipts from business done in September \$488.93 with a loss of \$29.69. In October, the receipts were \$555.44, net profits \$75.66. In November the business done was \$248.58 with a net loss of \$43.67. In December the business done amounted to \$190.00 with a net loss of \$250.75. I have no figures for January, 1920. That is when we stopped putting these out.

The restraining order was served on March 22d, 1919.

These figures show the conduct of the business and the results of the operations to January, 1920. There are no figures here for January, 1920.

#### Cross-examination.

The General Novelty Company was formed in January, 1919 or late in December, 1918.

The first sale appearing on Defendant's Exhibit 10 indicates it was made on February 10th, 1919. The business had been started a month when the first sale was made. The purpose of this business was to sell merchandise by means of these tickets. I bought the merchandise outright from various stores, but principally from I. Holsman. I have no records showing from whom I purchased merchandise. I have no records showing what the merchandise cost. I have records showing the money paid to I. Holsman & Co. The other purchases were

(Testimony of Paul C. Harbaugh.)

small and are listed under merchandise bought. Very nearly all my merchandise was bought from I. Holsman & Co. The amounts bought elsewhere were so trifling as to be insignificant.

From about January 1st I was employed by I. Holsman & Co., as salesman of jewelry. I was managing his wholesale jewelry business at the same time I was running the General Novelty Company. The offices were in the same building and on the same floor but in different rooms. I managed the General Novelty Company at intervals during the day. I drew from I. Holsman & [94] Co. \$300 a month. I am not able to state how much I got from the General Novelty Company a month. The books will show. I had no salary from the General Novelty Company. When I took money out of the General Novelty it was in cash. We had a checking account, for the first month. I have not the check stubs. They were kept for a long time but have been displaced. The entries in these books are made from the check stubs.

The money I received the first month was put in the bank; after that it was kept in the office and expenditures made from that. I never had a checking account after the first month. I kept the cash in the safe of I. Holsman in a separate compartment used for the place to keep the money of the General Novelty Company. It would have been safer in a bank but I was afraid of being attached by Mr. Dwyer. I first had that fear some time around February 10th, I think.

(Testimony of Paul C. Harbaugh.)

I received \$4,146.55 during the month of February from the business. The original entries of that amount were made in the journal. For instance the entries showing the Crouch account is on page 2. The entry there, Petty cash \$95.00, means that the money was put into the petty cash. I have no book of petty cash showing the items of petty cash. There is an entry of the items of petty cash in the salesmen's commission record. The pencil notation there was merely a memorandum and I intended to take it out.

The handwriting on page one of the journal, Exhibit Five, is mine. I don't know the exact date I made these entries. I made all the entries starting with February 12 down to March 11th at the same time.

During the month of February Miss Sullivan was in my employ as bookkeeper. I don't know why the entries were not made by Miss Sullivan. These are her entries of cash receipts in the month of January. None were made by her during February. A [95] possible explanation is because she had not had the experience of doing bookkeeping and I was showing her how to do it, how I wanted the books kept. In January they were made under my direction.

I can give a theory for the mutilation on pages one and two of the Journal at the top; something cut out. This was an old book and had evidently been heading with something else before I adopted it for my business. I believe it was an old book that formerly belonged to I. Holsman & Co.



(Testimony of Paul C. Harbaugh.)

Question. And they had their name at the top of that sheet and you cut it off; you erased it from the top of that page?

Answer. Evidently there was something there that I did not want there.

Question. And so you cut off the name of I. Holsman that appeared at the top of the page of your journal because you did not want their name to appear in this General Novelty Company's business which you claim belongs to you. You did not want their name there?

Answer. No.

I was the sole operator and owner of the General Novelty Company, and any damages accruing from the injunction is a damage only to me and I am entitled to it. I had no merchandise on hand when I started to do business.

The original entries showing the merchandise purchased are in the journal. The item on January 31st, merchandise, I. Holsman & Co. \$3,390.93, means that I bought during that month merchandise from I. Holsman aggregating that amount.

I have no entries of the various items making up that amount. Miss Sullivan probably made the entry January 3d or 2d. I am not sure. That is the first entry shown for merchandise during the month of January. On February first I had that much merchandise on hand. I can testify from my own knowledge that [96] \$3,390.93 was paid to I. Holsman & Co. for that merchandise, in different amounts at different times.

(Testimony of Paul C. Harbaugh.)

My attention being called to page 100 of the ledger, and to the payments to I. Holsman & Co. in even amounts, \$300, \$400, \$100, \$500 and \$300, that was my method of making payments to I. Holsman & Co. I did not pay him then according to the amounts of the invoices. I paid him different amounts on account.

No payments were made during the month of March. My statement that cash was paid for that was incorrect. I gave Holsman & Co. credit for merchandise he sold me without paying him any cash at any time. I am supposed to pay for it as fast as I could. I have no records or vouchers or invoices showing [97] what these sums constituted or how this total was reached.

Taking the summary of sales, being Defendant's Exhibit 10, the first sale was I. J. Ely of Clatskanie. I don't know who he is.

The original order shows that on page 11 there was a sale to I. J. Ely of Clatskanie for Assortment No. 101 at the price of \$150, less the dealer's commission of \$45. Total of \$105, box No. 23. The fact is that that was not a sale but this merchandise was placed on consignment with Ely to the end that when the merchandise was disposed of such money as had been received should be sent to me less the commission. The full assortment was not always sold with the box; nor would the assortment be sold in any fixed period of time. It all depended on the trade that the man had. It depended upon his ability to dispose of the stuff and the business con-

(Testimony of Paul C. Harbaugh.)

ditions of the town in which he was located and upon the permission of the police authorities of the place to allow him to have the stuff there for sale.

It depended upon a number of circumstances as to the time in which he disposed of the assortment and with respect to that it might take a week or a month *or* several months to dispose of the entire assortment and when I received my money for the merchandise I would still have the title to that box after several months if he had not sold the goods or made some other kind of a settlement. That was the theory of it; it didn't always work out that way.

This first Order No. 101 consisted of as noted on the back, one camera \$5.50, two manicure sets \$6.00, one knife and chain set .50, two belts 80 cents, four pair of links 50 cents, six scarf pins 60 cents, two cigarette cases \$1.00, two watches \$2.50, six knives \$1.50, four rings \$2.00, one poker set \$4.50, one toilet set \$5.50, seventeen boxes \$5.50, forty-nine articles for \$36.30.

The boxes were jewelry boxes. That is a total of [98] \$36.30 for 49 articles in addition to 3,000 collar buttons. This is what they cost me. The collar buttons cost \$6.00. I bought them from the Ecola Company in my name. I have no invoices for them.

Referring to the 17 boxes in this assortment number one; they were merely containers for these different articles in which they were placed when they were sold. They were not separate articles they went with it, so that instead of 49 articles there would be 17 less than that, or 32 articles. In addi-

(Testimony of Paul C. Harbaugh.)

tion to the 32 3,000 collar buttons costing me \$6.00. That is the price to me from I. Holsman.

I know what these articles cost I. Holsman approximately. They would be the same as they cost me in one or two instances only. The one that I recall is the camera. It cost him \$5.50 for the camera and he charged no profit on his merchandise to me for the camera. The camera is the largest article in the outfit. He charged no profit except perhaps two per cent cash discount, or something like that. He would get the cash discount.

Each box that I consigned with this merchandise contained 3,000 tickets, and the method of selling this merchandise depended upon the sporting instincts of the people who were buying the goods.

Take the Ely case again, to whom I consigned this merchandise on February 11th. Upon receipt of the order I made a card and marked thereon the consignment of this merchandise. This was merchandise which I had on hand from I. Holsman & Co., which I secured during the month of January and which I had not yet paid for. This merchandise was paid for by Ely on March 13th. That indicates that Ely had the merchandise in his possession a full month before he was able to dispose of it assuming that he was honest.

I had a cash-book indicating the money received during [99] that time. I have not got it. I don't know where it is. That cash-book should and would show the receipt of money during the time.

The \$105 received on March 13th we used *used*

(Testimony of Paul C. Harbaugh.)

for various expenditures of the business. There was a list in the cash-book referred to, there was a list of expenditures which at the end of the month were segregated and entered in here.

I admit now that I don't have the original record showing the receipts of money secured and the disbursements of money for expenses.

On this \$105 that I received Mr. Leven, the salesman was paid 15%. That would be \$15.75. A record was kept of the payment of money to the salesmen, on the salesmen's commission sheets. The record of \$15.75 paid to him is probably included in this \$42.15. There would be several commissions lumped in. There was also an entry in the cash book. I have not got that. That entry was made at the same time this was made.

Here is an order dated February 10th for assortment No. 101 for A. J. Kelly of St. Helens. A card was made for that order. There is an original record showing the shipment of that merchandise here on the salesmen's record sheet under Ben Levin. My record showing the record of items of merchandise disposed of or sold or consigned is indicated by the assortment number 1. We knew what was in it. There was an express receipt. I don't know where it is.

Referring to the card to R. A. Stewart, this may be the same order as referred to by the name of A. J. Kelly.

The record showing when that consignment was paid for is on the salesmen's record sheet under Ben



(Testimony of Paul C. Harbaugh.)

Levin. It was paid for March first. The handwriting is mine. I don't know why I put the name of Kelly on the card. It may be that Kelly and Stewart are the same. There must be some mistake there. I don't know what it is. [100]

My summary, Exhibit Ten, of sales made during the months of February and March previous to the injunction, include one to L. L. Frazer, St. Helens, under date of March 1. The index card shows that on March first assortment 101 was shipped to L. L. Frazer at St. Helens, Oregon.

This was not an outright sale on March first but that the title to the merchandise was still in the General Novelty Company, as appears from the following: "These goods are placed on consignment with the understanding that the title to same remains with the selling until paid for at the price and terms named above. Purchaser agrees to take the goods and pay for the sold portion at terms stated at any time upon demand of seller or his representative. Purchaser also agrees to provide a safe place for the above merchandise at all times and to assume full responsibility for loss by theft, fire or other contingency. I hereby agree to the above conditions and understand that no other conditions than those specified hereon will be recognized."

The records show that that consignment finally passed into a sale and the purchase money paid on May the 3d. That \$105 is included in our estimate of merchandise sold previous to the injunction. I

(Testimony of Paul C. Harbaugh.)

suppose the merchandise was not sold until after the injunction, and on May the 3d.

That order was contingent upon whether the goods were disposed of or not and until it was paid for the sale was not completed and remained in the seller.

I don't remember what efforts I made after the injunction in that particular case. In all cases the salesmen we had were instructed to substitute the new box and take up the old one. From the records it would appear that Frazer had received the box marked "Exhibit 2 for Identification."

The consignment made during the month of February to R. A. Stewart of St. Helens which record appears on page 10, that assortment was under consignment. The same would be true as to [101] whether or not it was sold or placed there on consignment as testified by me with respect to Frazer subject to the same terms and conditions.

The money was received on May 3d. I cannot state what efforts were made to get the box back from R. A. Stewart after March 27th and settle up with him for any merchandise he had sold up to that time.

I can remember quite a number of instances where we attempted to substitute the new box for the old. It would be necessary to take in another deal and put out a new box, and the dealer refused to do it. They seemed to think it was some kind of a scheme on our part to take away from them articles still in the assortment.

(Testimony of Paul C. Harbaugh.)

On the orders of Frazer and Stewart the original boxes were in their custody until May 3d.

I can't show when the boxes were returned, Defendant's Exhibit 2, I can only state that the money was received on May 3d. It is possible that the boxes were sent back some time previous to that. In some instances I put a notation on the index card showing when my boxes were returned.

Referring to the card of Frank R. Stowell, Buxton, Oregon, it appears that on February the 22d or the 24th, it is not plain, Frank R. Stowell agreed to accept on consignment Assortment 101. On May 2d was received \$30.00, and on June 5th \$50.00 and on July 12 \$15.00.

There is a notation showing the box was returned on that date. It appears after the item on January 12th and probably refers to that date. The box covered by that transaction is the same box that I was enjoined from using, this Exhibit No. 2 in the District Court.

In connection with the Stowell account, that is similar to the others I have referred to, in that they do not constitute sales during the months of February and March, but that the sales [102] were consummated after the injunction was issued. That may be true in a number of instances with respect to these items that appear on my books.

It would be impossible to state definitely what amount of business I would be able to do the following month, assuming I could use this box (Plaintiff's Exhibit 2) because of certain business condi-

(Testimony of Paul C. Harbaugh.)

tions that existed generally throughout the country. It might depend on the business ability of the people with whom these boxes were placed. On the retail trade they got during that period. On the state of business conditions, whether it was a healthy condition or sluggish where the boxes were placed. On the spending ability of the people who patronized the merchants with whom the boxes were placed. Also on the acquiescence of the police authorities in their disposition to allow the stuff to be sold in the manner in which it was sold, whether the returns would be little or much. There have been a number of cases where I have been compelled to discontinue the use of these boxes in certain localities because of police interference. This has been true in certain localities in both Oregon and Washington and might be true any place. In other words, this device has been construed by a number of police authorities as a gambling device.

Referring to page 35 of the ledger under merchandise sales, that represents the actual total amount of sales made during the month of February and of March. It shows the completed sales made during the months of February, March, up to and including March 26th, my total was \$3,789.35. Therefore the difference between that and what I claim in my summary, Defendant's Exhibit 10 of net return from sales during the period, \$11,266.00 must have been money taken in subsequent to the issuance of the injunction. I did not get this return during that period. The amount received sub-

(Testimony of Paul C. Harbaugh.)

sequently was taken from orders placed previously to the issuance of the injunction for which the money was not received [103] until afterwards. We do not always get our money when we do the work for anything. In this case the work was done and the sales made but the money was not paid until later.

The cash returns from sales made during the period between February 10th and March 26th is \$3,789.85. I had a cash-book showing the daily receipts. We had cash sheets on which the entries were made each day and I checked that each day.

The account I have shown of I. Holsman & Company shows that \$8,384.00 of merchandise was purchased from I. Holsman & Company between January and May 31st. Even sums of money were paid to Mr. Holsman on account of these purchases for this business, I think all cash.

I don't remember whether I would get receipts. I would pay him from \$450 to \$750 at a clip without getting a receipt for it. The only entries made of those payments were made in the journal and transcribed to this. These entries on page 4 of the journal were made March 31st or thereabouts, if the transactions took place during the month of March. [104]

I made these entries on March 31st from the cash receipts and were then totaled up. I cannot locate these cash sheets. In explanation of that let me state that when I left Mr. Holsman's employ I kept a desk in his office and left all my records there as I had taken them there for safekeeping after I had



(Testimony of Paul C. Harbaugh.)

quit this other business; that included vouchers, invoices and all other papers and books of my company, and when he went out of business they were all stored in the warehouse, Olson & Roe's warehouse and they were all taken down there together, and I went down and made a search for them but could not locate them—all of them. That is the reason I have not got them.

My bookkeeper on March 31st was Miss Sullivan.

These entries are in my handwriting. It was necessary for me to make these entries probably because she did not understand how to make them correctly, or something, I don't remember. I don't know how it happened that the entries of March 31st were made subsequent to April 24th items. Miss Sullivan was bookkeeper for me in the month of April.

All the entries of Holsman are in my handwriting. I made the cash record at the end of the month because I took special care of it; there were large amounts involved. I wanted it to be right.

This item, merchandise, \$913.52 was money paid out for merchandise to others than Holsman. These items are in the ledger. I cannot state offhand how it happened that I paid Mr. Holsman \$9,625.00 in cash apparently and merchandise \$2,257.00 making a total of \$11,882.99 up to December 31st, 1919, when I only owed him \$8,384.00.

This \$2,200.00 Journal entry on page 30 was cash. I paid him.

(Testimony of Paul C. Harbaugh.)

The MASTER.—Was that \$8,498.00 actually paid over to him: This account shows on February 10, 1919, that you paid [105] Holsman, \$5,147.00 more than you owed him.

There was consideration there. At the time I gave up this business I had a lot of merchandise, stuff of that kind on hand, that would be almost worthless to me and he took that stuff over and took all the accounts we owed over, and we made a settlement of some kind. I was looking for the inventory at the end of the year to see how much it was. (Witness examines his records.) There is an account here headed "merchandise," I believe.

I paid him such money as I took in and received credit for it from him, with the understanding that we were to have a settlement later. Now, that brings us into subsequent transactions it might be well to explain. Early in 1920, after the close of the year 1919—or to begin with an explanation of the situation, Mr. Holsman was operating two retail stores on Washington Street, the Crescent Jewelry Company and the Keystone Company, in each one of those he had a manager who received a salary and a percentage of the profits. Fifteen per cent, I believe, was what they received, and he also operated I. Holsman & Company as a wholesale jewelry concern. After the close of the year 1919 and about the early part of 1920 the four of us, Mr. Holsman, Mr. Savan who was the manager of the Keystone Company, Mr. Flatow who was the manager of the Crescent Jewelry Company, and myself entered into

(Testimony of Paul C. Harbaugh.)

an agreement which was substantially as follows: In consideration of my turning over to Holsman what credit I had coming on his books and turning over any merchandise and fixtures, and so forth, that I had on hand using in the General Novelty Company, I was to receive an interest in all his other stores, ten per cent interest, and Mr. Savan and Mr. Flatow were to pool their share of their profits—they were to relinquish those, rather—Mr. Savan was to relinquish his fifteen per cent of the profits in the Keystone Jewelry Company and Mr. Flatow was to relinquish his fifteen per cent in the Crescent Jewelry Company, in consideration of receiving seven and one-half per cent of the profits of all [106] of the business combined—that is of the pool. In other words, Mr. Holsman was to receive seventy-five per cent, Mr. Savan and Mr. Flatow each seven and one-half per cent and myself ten per cent. That was the agreement that we entered into and for which I turned over this money and this merchandise and accounts. There were some accounts of the General Novelty Company outstanding not collected yet, various things of that sort.

On journal page 30 it looks as if two hundred and twenty dollars was changed to twenty-two hundred. The figures are those of Miss Sullivan. I first noticed this change now.

The posting of this amount of 2200 or 220 into the ledger was Miss Sullivan's writing, but I am not certain about these figures. They don't look like mine. Mine are immediately above there; this here

(Testimony of Paul C. Harbaugh.)

is mine. That 30 appearing alongside the 2200 is in my figures.

Page 101 of the ledger shows that on February 9 and February 10 I paid Mr. Holsman \$595.41 and \$116.38 respectively; that was money coming into the General Novelty Company and turned over to him. The consideration for that was the agreement I have described. It was an oral agreement only. Mr. Holsman and Mr. Savan and Mr. Flatow have knowledge of that agreement.

I turned the accounts the General Novelty Company had against people over to Holsman. Holsman was going to have as his share in the profits of the general Novelty Company Seventy-five per cent, by the agreement we entered into in 1920. Previous to that time I had no arrangement with him for any share of profits.

Part of these boxes, Plaintiff's Exhibit 2 in the District Court were built by Louis Herder, who is now associated with the American Showcase Company, and another part were built by some other man. Two hundred were built. I believe they were invoiced to I. Holsman at \$2.50 a box. I paid for them.

Here is an entry of part of it. Page 1 of the journal, and item of \$176.75 and on the same page an item of \$320.00 [107] The original entry from which I made this item, Furniture and Fixtures, \$176.75 was made on a cash sheet that I have lost. Now this other item Furniture and Fixtures \$320.00

(Testimony of Paul C. Harbaugh.)

under February 28 I entered from the cash sheets. I paid this in cash.

These tickets, being the tickets found in Plaintiff's Exhibit No. 2 in the District Court, I think were printed by Hancock Brothers, in Oakland or San Francisco; I don't know which. I ordered them; I believe they were invoiced to I. Holsman & Company.

I haven't any correspondence left; it was lost.

I testified in the Federal Court in the case of Dwyer versus Holsman as follows: "Now, as far as new business was concerned after this preliminary injunction was issued, instead of putting out this same box, this same kind of box which was introduced as Plaintiff's Exhibit 2, I built still another kind of box."

I also testified at that hearing, in answer to Judge Bean's questions, that this whole thing was in the nature of a gambling device, it was a matter of chance. I, at that time, was operating these plaintiff's Exhibit 2. My organization consisted of a bookkeeper and salesman. I think I paid Winnie Sullivan, the bookkeeper twenty-five dollars a week or one hundred *hundred* dollars a month. My salesmen were Ben Levin, Paul Enloe, and Max Schultz, who all worked on a commission basis. I paid Louis Rubenstein fifty dollars a week, or two hundred dollars a month.

I don't remember what the rent was but I paid it to a concern in the Phoenix Building. I paid all of the rent by cash and the amount was between



(Testimony of Paul C. Harbaugh.)

fifty and sixty-five dollars a month. Nothing that I have shows the payment of rent.

I don't know that the Keystone Jewelry Company and the Crescent Jewelry Company also filed their articles the same day, and that Savan Filed assumed ownership for the Keystone and Flatow for the Crescent Jewelry Company. Those are the companies [108] which were owned by Holsman prior to December, 1920. I don't know that the facts were stated that it was owned by Holsman, but I knew Holsman owned them.

I paid Holsman all the sums that are listed in there. At any time I wanted to, without a demand for those payments, I draw those items listed, and referring to page 50 of the ledger the first withdrawal is March 31, total \$35 for the month of March, which is all I withdrew in the month of March.

In the month of April all I withdrew was \$105.00 and in the month of May all I withdrew was \$270.00. I did not have any fixed sum to withdraw any particular week, but only as I felt like it. And at the same time, referring to page 100 of Holsman's in the month of March, I paid him back.

In the month of April I paid him additional sums of money, making a total up to that time of \$4,125.00. I was also drawing out thirty-five dollars a week, and also in the month of July, \$100.00—July 15, \$100.00, July 25, \$35.00, August 5, \$100.00, July 31, \$35.00. In explanation of how an early date follows a subsequent date; for instance, of how an en-

(Testimony of Paul C. Harbaugh.)

try of August 5 appears subsequent to that of July 31, it is evident that this is the result of an error in posting. In other words, the item was not posted, a mistake on the part of the bookkeeper, and later she discovered it and posted it.

It also shows in the month of July I took out \$170.00 and the month of August I took out \$200.00.

Referring to card of B. A. Hunsaker, Roseburg, Oregon, it appears thereon that on February 26 assortment No. 101 was shipped to this man, and on April 3 I received a check on account for \$31.50; on May 13 another check of \$63.50.

The usual method of doing business as I was conducting it was to take what proceeds had been obtained from the sale of merchandise, allowing him his commission unless he intended to continue with the box and dispose of all the merchandise.  
[109]

I have no knowledge of individual transactions and thus I do not know why it was that I didn't immediately take back the box on April 3, with the balance of the merchandise as required by the injunction, but it frequently happened that we made an effort to replace the old box with a new one; in every case our salesmen had these instructions, but it frequently happened that the dealer refused to turn them over or was disinclined to.

From this record it appears that box Exhibit No. 2 was returned after May 13th; and on May 13th I received another remittance from this same

(Testimony of Paul C. Harbaugh.)

box, as well as the remittance of April 3, and the box was not returned until after May 13.

The card of M. McGuirk, Medford, Oregon, shows that on March 5 I shipped him Assortment No. 101; that on April 5 I received a check on account of \$21.35; and that on May 15 I received a check in full and that the box was returned. That indicates that he was permitted to keep that same box after April 15th. And the box was not returned until after May 15, when the balance of the merchandise, or as much of the merchandise as could be sold was sold.

Now, referring to card of George W. Staley, Roseburg, Oregon, notice that on February 26 I delivered him assortment No. 104; that on April 3 I received check on account of \$25.00; on April 13 I received another check of \$25.00; on May 26 I received a remittance of \$20.00 and on June 20 I received the balance in full of \$35.00, making a total of \$105.00, and on June 20 the box was returned. That shows that he was permitted to have in his possession from the time he received it Plaintiff's box Exhibit No. 2.

Referring to card of F. M. Wilson, Medford, Oregon, notice that on March 5 I shipped him assortment No. 104; that on April 5 I received check for \$19.40; that on May 15 I received a check in full of \$6.65 and that thereafter the box and the [110] balance of the merchandise was returned.

That shows that he was permitted to keep the box after April 5, when the first installment was

(Testimony of Paul C. Harbaugh.)

paid. In all of which cases one remittance was received subsequent to the injunction and a last remittance and the box were returned after the first remittance. And some of these remittances were made in the form of collections by the salesmen when they called. The records would not show it. It was the usual procedure to have the salesman call in person and take a reorder or take what remittance he could get.

Now, calling attention to the card of Thorpes Smoke House, Pullman, Washington, notice that on February 13 assortment No. 102 was delivered by Schultz and notation thereon it appears that March 13 I wrote him for remittance; on March 31 there is a letter from Rubenstein wherein he states the town is closed and that on April 1 the box was returned.

That indicates that the box was returned because of the fact that the town was closed subsequent to March 31, from the appearance of this card, and I could not tell when similar returns would be made because the police would step in and do their duty.

(Question by the MASTER.)

In the month of April you have listed here as the net returns from sales \$2,684.56?

That was money was obtained from the sales of merchandise put out in the field after the twenty-sixth of March. It represents cash received from merchandise put out in April. In other words, we may have put out an amount of merchandise con-

(Testimony of Paul C. Harbaugh.)

siderably in excess of that amount in April, but that was the actual cash received for all merchandise put out.

In May you have listed here \$4,239.83.

That represents cash returns from merchandise placed [111] with the dealer in May, none of which represent cash received for merchandise put out in the field in April. In this summary the balance of the money obtained from the sale of merchandise put out in April is shown on lists of each account sold or of each one placed. For instance, in April we placed merchandise with all of these different parties on the dates shown. Opposite in this column is shown the amount of money received applying to that transaction. The amounts were received at various times. That might be received in June or July, or May or at any time.

The sum of \$11,266 which I show as the net returns from the sales made between February 10 and March 26 does not represent money that was actually received during that period, but is the total cash returns from merchandise put out during that period.

The cost of merchandise was figured from the amount received and assumed that the merchandise cost fifty per cent of that amount. The reason I could trace out the cost of that merchandise accurately was because the assortment would be placed and partly run off. That is, we would re-



(Testimony of Paul C. Harbaugh.)

ceive, say, seventy-five dollars and certain merchandise would come back. We would not keep a record of what merchandise came back, only of the cash received.

The amounts in the books represent actual commissions paid. For instance, here is the amount \$52.32 paid for the month of August, which commissions were paid upon orders received in August.

There was no difference in the amount of police interference between February and March and the latter part of March and from April on.

We made an attempt to recall the boxes which were out without waiting until they would run off the merchandise that was represented by the tickets in the boxes and attempted to substitute these other boxes in each case. But in many cases the dealers [112] refused to give them up. They said, "Well, here, most of the main prizes are left, the cameras, for instance, are left, and my customers have spent considerable money and got very little for it and now they want the privilege of getting those cameras," and they thought it was simply an excuse on our part to get those cameras back without giving them a chance at them. No commissions were paid on the business originating in July, August and September. Also October, November and December, because we had no men working on commission. We had only one salesman at that time, if any. I don't know when

(Testimony of Paul C. Harbaugh.)

Rubenstein quit, but about that time we only had Rubenstein, and, in fact, most of our business at that time was done by mail. It didn't pay us to put a salesman out.

There is a relation between the amount of money paid Holsman and the amount I show here as the cost of merchandise because merchandise was billed to me from Holsman and credited to his account here. Amounts that I gave him were in payment of those bought to the amount due and there was additional payments. And the fact, the procedure was that all money I got in outside of what I needed for other purposes I turned over to Holsman.

The reason that I paid Holsman twenty-two hundred dollars on the second of September was because all money that I got in I turned over to him, with the assumption, the understanding that for what I turned over to him there would be a settlement of it and I overpaid him because he needed the money at that time and I didn't. At that time he was heavily in debt and the reason you find on December 31 another charge made of merchandise from June 1 to December 31 in the amount of \$2,257.99 was because during that time Holsman had been taking back merchandise that I had on hand in small amounts at a time, as fast as he could use it. We kept a record of that and then the total was entered. [113]

I made further payments to him of \$595.41 on February 9, 1920, \$116.38 on February 10 of the

(Testimony of Paul C. Harbaugh.)

same year and then a cash payment of \$1,541.47. For the same reason I overpaid before, I continued to turn over accounts. An estimation of the value of accounts outstanding, I was turning those over to Holsman and estimation was made of their value. On December 31 I had overpaid Holsman \$34.98.

Now, then, I paid him \$700.00 more within the next two months. In the meantime, some time around December 31, I entered into an agreement with Holsman and Savan and Flatow to pool all our interests and turn over all these moneys, anything that came in was to be turned over to Holsman. That is the reason these were turned over. Mr. Holsman had an interest in that business after that time.

He didn't have an interest in the business in October 1920. He didn't have a direct interest in the profits of the matter, outside of the sale of the merchandise. He was interested in the outcome of the trial because if I were enjoined from continuing in business Mr. Holsman could not sell any more goods and it was primarily for the purpose of eliminating a lot of testimony and arguments. The plaintiff wanted to connect Mr. Holsman with it so that if he had to collect damages he could collect from Mr. Holsman, and in order to avoid any discussion.

Cross-examination Continued.

The merchandise billed to me was not billed at

(Testimony of Paul C. Harbaugh.)

cost. The Gillette razors were billed at cost. I am not certain whether the cameras were billed at cost or not.

Invoices made to me have been misplaced. I believe I could get copies of those invoices.

Assortment marked Plaintiff's Exhibit "A."

I do not believe profits were made on the kodaks, so far as Holsman was concerned. There was profit on one manicure set [114] but I don't know the amount. I know there was a profit because I know he billed them to me at a profit and they cost him about thirty cents less; thirty to fifty cents. Profit was made on two Icy Hot bottles but I don't know how much.

I was acting in a dual capacity of manager of Holsman & Company and the owner or representative of the General Novelty Company. I didn't bill these things out but merely superintended it.

The only articles I know he got a profit on are, two Icy Hot bottles, three dollars; two pair of links, fifty cents; one clock one dollar and a quarter; two cigarette cases two dollars and a half; two brooches, sixty cents; two flash lights one dollar ninety cents; two pair of brushes at two dollars and a half; two scarf pins at eighty cents; two cards in cases, one dollar four cents, and six boxes, two dollars twenty cents. No profit was made on the Gillette razor and I don't know about the kodaks; I believe there was no profit on them; I may be mistaken.

(Testimony of Paul C. Harbaugh.)

I know there was a profit but I don't know the amount on any of the articles. .

I testified as to a certain transaction with one Crouch of Oakland, Oregon, then traced it out and I testified that the reason I was unable to do much business subsequent to the issuance of the injunction was because the use of these circular boxes No. 7. This card of Crouch, Oakland, Oregon, upon which it appears that on May 6 there was an assortment shipped and on July 31 I received in full \$84.98 and there are pencil notations on it which says "Advised P. V. E. town closed on 20," so as far as the Crouch transaction is concerned, at least, the reason I could not do any further business with that gentleman was because the town was closed; which means police interference at the time.

### **Testimony of Sam Flatow, for Defendant.**

SAM FLATOW, called as a witness on behalf of the defendants, being duly sworn, testified:

I live at 294 Washington Street, and am thirty-six years [115] old. I know Mr. Paul Harbaugh, and the General Novelty Company; I know that Mr. Harbaugh owned the General Novelty Company. I was in his employ and tried to put out some of the merchandise selling boxes for the General Novelty Company during a period within two or three months after the injunction. I took out the round, circular boxes, but the trip was an absolute failure. Altogether I made quite an ex-



(Testimony of Sam Flatow.)

tensive trip, starting here at Portland, and going to Spokane; from Spokane to Helena, Helena to Billings, Billings to Cheyenne, Wyoming, Cheyenne to Denver, Denver to Grand Junction, Colorado, and Salt Lake City, and then back to Portland, again.

They were a little bit too bulky and they didn't like the style of the box. That was the biggest complaint, was that it took too much room on the counter; that was the biggest complaint. And there was a few other features they didn't like about it; for instance, most of them had seen other boxes and said they had the tickets right in front of them and this one here was in six different sections and had to keep turning the box around, and one party in particular I spoke to said it didn't work as good as this box here, the tickets used to get caught and jam.

Some time subsequent, some several months, I remember an agreement that was entered into between myself and Mr. Holsman and Mr. Harbaugh and Mr. Savan. We had an agreement to pool all the profits of the Keystone Jewelry Company, of which Mr. Savan was the Manager, and the Crescent, of which I was the manager, and Mr. Holsman's wholesale house, and the General Novelty Company, and Mr. Savan and I were to get seven and a half per cent of the profits, besides the salaries we drew from the store, and Mr. Harbaugh was to get ten per cent of the profits. What his

(Testimony of Sam Flatow.)

salary was I don't know anything about that. I was not interested as a partner but in the profits only; that didn't give us any privilege in the stock and we were to account to each other for the profits [116] and settle accordingly at the first of the year.

Cross-examination.

I have known Isadore Holsman about five years. I first entered his employ four years ago on the fifth of December. I was employed as a salesman in the Crescent Jewelry Company which he owned, and ran under an assumed name. I continued in his employ until I bought him out; bought his interest out last September. I went out on the road in the year 1919 for Harbaugh, or the General Novelty Company because business was a little bit quiet.

My salary was the same while working for the General Novelty Company as it was while working for the Crescent Jewelry Company except then my expenses were added to it and I maybe had another thing, that is what probably induced me to take the trip for Mr. Harbaugh, was that I had a brother in Salt Lake City and I saw a chance for a little visit with my brother and that happened on my route, so that decided me to take the trip. My salary for the three weeks was \$105.00 and I got cash for about three hundred and fifty dollars from the General Novelty Company.

Mr. HARBAUGH.—This sum was included in

(Testimony of Sam Flatow.)

item in the journal, Defendant's Exhibit 5, on page 11 in the amount of \$1569.49.

I first went to Spokane and I just had the samples of three boxes and three separate boards with me. I did not dispose of any of these in Spokane nor any of these boxes on the road at all because none of them wanted to put them in. I called on half a dozen different people in Spokane. When I went to Salt Lake I went on more of a visit there than I did to put out those boxes.

I signed my name to the certificate of assumed name on file with the County Clerk's office in this county for the Crescent Jewelry Company. It must have been considerably over a year after I was first employed, and had only a commission interest, besides the salary. It wasn't true, at the time I signed my name that I was [117] the sole owner of the Crescent Jewelry Company, but I signed for the purpose of keeping Holsman's name out of it, on account some of the wholesale houses didn't want to sell him goods on account of being connected with a retail store. There were no written articles of agreement because we fellows trust one another. Holsman was a party to the agreement.

I didn't know what the profits of the General Novelty Company were but I knew that the Keystone made money and the Holsman company made money and I was getting ten per cent of the profits of the Crescent Jewelry Company at that time

(Testimony of Sam Flatow.)

and I knew the profits of the Keystone Jewelry Company and I. Holsman and Company and the Crescent Jewelry Company if I was to get seven and a half of the combined profits of that, I knew that would far exceed the ten per cent I was getting of the Crescent Jewelry Company, and that was enough for me and I was not depending on anything that the General Novelty Company had done or could do, but I figured if others could make money I could do it. How much I didn't stop to figure. I knew that the two, with the Crescent Jewelry Company, we could make some money.

**Testimony of Joseph Savan, for Defendant.**

JOSEPH SAVAN, a witness called on behalf of the defendant, being duly sworn, testified:

My address is 274 Washington, my age is thirty-five, my business at the present time, merchant; jewelry merchant, in Portland, Oregon. I know Mr. Paul Harbaugh, the General Novelty Company and Mr. Holsman and Mr. Flatow here.

I had a verbal agreement with regard to profit sharing of the business carried on by these parties just mentioned, at which date I can't say. It was some where in 1920, but I don't just recollect any particular dates. At that time I was receiving a ten per cent commission. When we came to this agreement I agreed to take seven and one-half per cent of the profits of the pool—that is of the pooling profits, which at that time was altogether, that is,

(Testimony of Joseph Savan.)

for the Crescent Jewelry Company, the Keystone [118] Jewelry Company, The General Novelty Company and the I. Holsman Company. There was no partnership arrangement between any of these parties but simply an interest in the profits, and there was a settlement between us occasionally as to those parties if we needed the money. As it happened I didn't draw it, but it remained in the business. I was entitled to draw it when I chose. There was to be an accounting between us whenever we wanted.

#### Cross-examination.

There was an accounting when I bought out the Keystone Jewelry Company in March, 1921.

I have known Isadore Holsman about ten to twelve years and first entered his employ seven years ago when he was in the wholesale business in the Morgan building and continued to work for him until 1921 with the exception of about a month. The last place of business that I conducted for him, prior to buying him out was the Keystone Jewelry Company with which I was connected up to March 1916. I think it is five years at that time; it is still the Keystone, of course.

I was manager of the store and received a salary and a commission. I was drawing different salaries at different times; thirty-five to fifty dollars a week.

The Keystone Jewelry Company was an assumed name and the sole owner of the Keystone Jewelry



(Testimony of Joseph Savan.)

Company was at that time I. Holsman, and that situation existed until I purchased the entire stock, which was in March, 1921.

I think that prior to the time I purchased that store and at a time when Mr. Holsman was the sole owner of the store, I likewise filed a certificate stating that I was the sole owner, because Mr. Holsman was in the jobbing business and the jobbers will not sell to a jobber if he is interested in a retail store. To overcome that we had to show that the stores were not belonging to Mr. I. Holsman. [119]

**Testimony of Paul Harbaugh, in His Own Behalf  
(Recalled—Cross-examination).**

PAUL HARBAUGH resumes the stand.

Cross-examination (Continued).

I know Mr. Flatow was paid three hundred dollars in cash and I believe that it is part of an item appearing on page 11 of the journal being plant expenses \$1569.49. I am positive that that was part of that because the amount is fixed in my mind. I know that he made—that our expenses for that month was exceptionally large because Mr. Flatow and myself took a trip in that month and that is the way I fix it.

Plant expense is all expense outside of commissions paid. In April the plant expense was \$696.51, and in May \$1596.49, the nine hundred dollars difference being accounted for in part by Mr. Flatow's trip and the trip that I took and the fact that we

(Testimony of Paul Harbaugh.)

were making—our salesman, Mr. Rubenstein, was continually on the road at that time, we had to make a number of short trips to take care of these ticket vendors that were not working.

**Testimony of Sam Flatow, for Defendant (Recalled  
—Cross-examination).**

SAM FLATOW, recalled as a witness, testified on cross-examination.

We have nothing to do with any of the other stores now. We have each bought a store and thus when I bought the store from Holsman that settled the pooling agreement.

I don't remember what profits were allotted to Mr. Harbaugh. In fact, I don't remember what was allotted to myself, because we each had the privilege at any time, if we needed any money, to write a check for it ourselves and that was dropped off at the end of the year, or whenever the accounting was made.

Mr. Holsman wanted to retire from business and he made the proposition to each of the boys to buy a store off of him. I was manager of the Crescent Jewelry Company, Mr. Savan the Keystone Jewelry Company and Mr. Harbaugh has got his store on [120] Third Street. Mr. Holsman wanted to get out of business so he sold out the other stores, one to Mr. Harbaugh, one to Mr. Savan and to me he had nothing to sell because he had nothing to sell. Our lease was about up, it had to run from March to October and we could not get much satis-

(Testimony of Sam Flatow.)

faction whether we could get a new lease or not, so it was no use Mr. Holsman trying to sell to me, so we had a proposition then I should get half of the profits. Besides I was drawing a salary, I think fifty dollars a week, until we could find if we could get a lease, and Mr. Holsman didn't interest himself to get a lease, so I got out, and Mr. Swerland had leased the floor to the Knight Drug store and I went after them to get a space. I got a store—an agreement that I would get a space. It wasn't decided then whether I would get on Fifth Street or the space I did get. About two months previous to the time my lease expired Mr. Holsman didn't know I was getting a lease, and he came in one day and he said, "How much will you give me for the place, for the stock?" I said, "I will give you five thousand cash." He said, "Give it to me." He said, "If you get a lease I will sell you the fixtures." I figured in case I didn't get a lease I had still two months to sell out the stock and it was a good buy because there was about \$9,400.00 of stock there and I figured we could run a sale in those two months and still make a little money on it, but as it turned out I got a lease and then I turned around and bought the fixtures for four thousand dollars.

Mr. Harbaugh did not submit any profits made by the General Novelty Company because there wasn't any separate statement from any one of the stores. I think it was one statement of the whole thing. We could not tell from that who made the

(Testimony of Sam Flatow.)

profits, whether it was Keystone Jewelry Company, Crescent Jewelry Company, General Novelty Company or Holsman. I looked upon Mr. Harbaugh as the representative of the General Novelty Company and he was a party to the profits of the other stores and I think he was [121] consulted when this pool was dissolved by mutual arrangement last March.

**Testimony of Joseph Savan, for Defendant (Recalled—Cross-examination).**

JOSEPH SAVAN, recalled as a witness, testified on cross-examination.

I never dealt with Harbaugh as manager of the Novelty Company when I entered into this pooling agreement.

The MASTER.—If it should appear that the other claimants other than Harbaugh make no claim for compensation for loss of profits, are counsel then interested in the matter of the interior of their business arrangements among themselves? In other words, we have a number of defendants here. Now, then, if Mr. Holsman and I. Holsman Company and these other defendants waive any right in the profits, or any claim to profits, is it of particular importance to you to develop that somebody else might have been interested in this business at that time?

All of the petitioners have offered Mr. Harbaugh upon the stand, representing all of them. Mr. Harbaugh testifies that he is the only person inter-

(Testimony of Joseph Savan.)

ested in that business, that has any right to any part of the profits. I think they would be estopped to claim that anybody else did have any right to them.

Mr. GEISLER.—That is the position I want to take, that all parties are knowingly acquiescing, as it were, in Mr. Harbaugh's assertion here as to ownership of that business in the General Novelty Company. I merely make that statement to simplify the procedure, because I take it that the only interest the Court has is to determine that the right party gets the damages which may be ascertained had been occasioned by the wrongful injunction. I am here and make a statement on account of them all and bind them all according to the decree of the Court and that will be the end of the proceeding as far as all of the defendants are concerned.

**Testimony of Paul Harbaugh, in His Own Behalf  
(Recalled).**

PAUL HARBAUGH, recalled as a witness for further [122] examination, testified on redirect examination:

Police interference occurred from the very beginning, was spasmodic, and notwithstanding such interference I did the business which I have testified to prior to the time of my being enjoined. At the time I was enjoined I had not attempted to measure out the amount of the profits. I did know that



(Testimony of Paul Harbaugh.)

we had made profits but I made no attempt to learn the amount.

In explanation with regard to this cash-book which has been spoken of as a book, I meant sheets, record sheets. Similar to the salesmen's record sheets in which all receipts were entered on the cash record sheets and also all expenditures. Those sheets were kept under my supervision and I checked up the amount of cash on hand to see if it corresponded with the balance shown on the sheets. Those sheets were preserved. I last saw them at the time I left Holsman's employ, about March, 1921. They were left in his office in a desk and subsequently that desk, amongst all other things in his office, and a lot of things in the basement of the Crescent Jewelry Company, were taken down to Olsen & Roe Warehouse and actually dumped into a room there. All mixed up in great disorder. I had nothing to do with the moving of those things but I have gone to that storage room two or three days ago and moved everything out of that room and went through everything that I could see that partook of the nature of a paper or document and I found these index cards which is Defendant's Exhibit 3. And also found some of these photographs which are the only books or records of the General Novelty Company that I found. The original orders were in the custody of Mrs. Johnson, who was Holsman's secretary or bookkeeper. I found those night before last. [123]

(Testimony of Paul Harbaugh.)

Redirect Examination.

I will explain to the Court the nature of my business as compared with the business Mr. Dwyer was conducting. He was conducting a business with boxes same as mine, putting out same sort of merchandise in practically the same way. I have had occasion to examine the kind of merchandise he was putting out. They were similar, different assortments, in most instances the same. The class of merchandise we were putting out made a difference in loss of business or getting of business only in that the better the merchandise the more business we could expect to do. The candies, jewelry and other merchandise which he put out were not the same, they were similar—no two assortments the same, all similar as to character and value; same is true of those of Mr. Dwyer.

The decline of business was caused by inability to use the box that we had previously used which did not compare in value with the old box. I had means of supplying all the trade I could get for my boxes.

I have examined the box here and determined that the box which I put out from February 25 to March 24, 1919 inclusive, is the original box marked Defendant's Exhibit 2 in the District Court. From February 25 to March 24 inclusive we put out 74 boxes. The return from the boxes was approximately \$8,737. I have the figures only for the total cost of the merchandise in those 74 boxes that I put out during this period. We put out a

(Testimony of Paul Harbaugh.)

total of 74 boxes bringing volume returns of \$6,465.-54; the cost of merchandise put out with those boxes merchandise \$3,232.75, commissions paid salesmen \$969.85, other expenses \$458.80, making a total of costs of 4661.40, leaving net profit of \$1,804.14.

*Cross-examination.*

The net profits of \$1,805.14 covers orders received and boxes sent out but does not mean that the estimate of returns [124] received included cash received during that period. The actual receipts in cash for boxes put out during that month and cash also received during same period \$2,803.75 and the expense during that period totaled \$2,243.45, leaving net profit during period of month \$560.30. These figures given here are based on salesmen's record sheets which were written by Mrs. Minsky in most cases. These entries were made as the receipts came in and in cash sheet at the same time.

The original entry of the receipt of that money was first placed in the salesmen's cash sheet. For example, these salesmen record sheets, being Defendant's Exhibit 2, reads as follows: "February 24, E. A. Blaesing, Salem, Oregon," and the pencil notation of \$23.85. The date there is the date of shipment and that entry was made some time on or after February 24th. The entry of cash received was placed in cash-book.

When the order was shipped out there was an entry made in salesmen record sheets and an entry made on the card.

(Testimony of Paul Harbaugh.)

Now, as to these expenses and cost of merchandise. When merchandise was ordered from Holzman and received from him the entry would be made in a journal.

On summary sheet, Defendant's Exhibit 10 the first item designated net returns from salesmen means moneys actually received from boxes and merchandise and includes expenses in putting them out, overhead expenses, is without the overhead expenses deducted, and amounts to \$11,266.00.

That figure \$11,266.00, does not mean that I actually received that amount of money during that period. The fact of the matter is that I only received, as shown by the ledger, page 35, the actual cash received during that period was \$4,738.00, from February 10 to March 28 inclusive, the balance to make up the Eleven and so forth was received during the balance of the year at different times. But the total moneys actually received from February 10 to December 31, was \$21,476.27. [125]

According to the ledger the total amount of merchandise sales from February 10 to December 31 amounted to \$32,281.22. This discrepancy of \$10,000 in the money received is due to the fact that we made sales other than through these boxes.

Goods sold outright included cameras and stick pins and other articles which we sold to various persons, Mr. Lavine and others. Goods sold by these devices are shown in record sheets.

The total of the cost of merchandise amounted to \$11,131.14 and on page 130 of ledger, which is

(Testimony of Paul Harbaugh.)

the ledger sheet showing amount of merchandise purchased during the year, the amount \$1,870.56 represents amount of merchandise purchased during that year, whereas the summary shows amount of merchandise sold during that year as \$11,266.00.

“Commissions paid” total \$1,788.75 and “other expenses” of \$5,717.53 or grand total exclusive of cost of merchandise, or \$7,506.28. These figures of commission paid and all other expenses must cover all expense in the operation of that business outside of cost of merchandise. These figures all appear in the ledger and there could not be any difference in the amounts of the ledger, so far as expense and commissions are concerned. Now, I call your attention to item of expense road, page 20, which shows that during the year 1919 \$4,468.23 was paid for road expense. The grand total commissions paid \$1,788.75. That last amount also includes traveling expenses of salesmen on salary and not on commission, previously referred to. The road expense and plant expense would cover all expenses whether commission basis or salary basis.

Page 10 shows “expense plant” total \$6,464.07, and “expense road” totals \$4,468.23, making a total of \$10,932.30 for expense in connection with these devices. This total ought to appear in the summary. The grand total is \$7,506.28, a difference of some three thousand dollars. [126]

Mr. GOLDSTEIN.—I offer these certified copies



(Testimony of Paul Harbaugh.)

of assumed business name certificates of Flatow, Savan and Harbaugh in evidence.

Thereupon the certificates were accepted in evidence and marked Plaintiff's Exhibit "C," "D," "E," respectively.

I got my store from Mr. Holsman in February, 1921. My store is located at 121 Third Street and is a jewelry store. I had an understanding that would make me owner of one of Holsman's stores, I believe about February, 1920. I was to take over store of Crown Jewelry Company, and filed a certificate later.

I took over store—bought store from Mr. Holsman—he was to receive 50 per cent net profits. On February, 1921, we ended that relationship.

Prior to February, 1921, I perhaps, filed certificate of assumed business name of Crown Jewelry Company, claiming to be sole owner, but Mr. Holsman was to receive 50 per cent and one of my salesmen was to get 10 per cent.

I paid \$2,500 or \$3,000 to Mr. Holsman at that time but am not paying him any of the profits since February, 1921, when I bought out his 50 per cent.

"Question. Do you remember the testimony of Mr. Savan, that while employed by Mr. Holsman he filed a certificate of assumed business name claiming to be the owner of a jewelry store, when in fact I. Holsman was the owner?

Answer. Yes.

Question. You also heard testimony of Mr.

(Testimony of Paul Harbaugh.)

Flatow claiming to be the owner when the truth was that Mr. Holsman was the owner?

Answer. Yes.

Question. Do you know when they filed those certificates?

Answer. No, I don't remember.

Question. You filed a certificate likewise about the [127] same time?

Answer. I suppose so.

Question. Don't you know?

Answer. I filed one but I don't know whether it was the same time or not.

Question. For the purpose of refreshing your recollection I hand you these certified copies of assumed business name certificates of Flatow, Savan and yourself and ask you if this refreshes your recollection as to the time when those certificates were signed and before whom the acknowledgment was taken and the time when they were filed?

Answer. They speak for themselves.

Question. Did you all appear before the notary at the same time?

Answer. Ben Lavine knows all the signatures and came out and fixed it up.

Question. Did you go to his office or did he come to yours?

A. He came to my office.

Question. Were Flatow and Savan present in your office and all three signatures taken at the same time?

Answer. Possibly about the same time."

(Testimony of Paul Harbaugh.)

Further Redirect Examination.

The last time I saw the original cash sheets they were in a desk in Mr. Holsman's office in the Phoenix Building, about February, 1921. I last saw the original invoices for merchandise bought from Mr. Holsman at the same time, and the express books in which original entries were made. I have since gone to the warehouse where Mr. Holsman has all his things stored and went through everything but I couldn't find them.

Recross-examination.

Mr. Holsman owns the round boxes designated as Defendant's Exhibit No. 7, now, I turned them all over to him at the time of [128] this pool. I believe they were originally paid for by Mr. Holsman and he was paid by me because I didn't have the money, this was subsequent to March 27 after injunction had been taken. Mr. Holsman could get credit on these and I couldn't.

(Questions by the MASTER.)

None of us received any cash, we received credit when this pool arrangement was made. I received between three thousand and fifty-five hundred in credit on Mr. Holsman's books. Mr. Holsman never gave me any other credits or gave me any money. He paid me a salary, for services rendered, it had nothing to do with pool itself. There were considerations involved that I was to receive 10 per cent interest in all of his business. I went in that pool with Mr. Holsman owing me between \$3,000 and \$5,000 and I received 10 per cent of all

(Testimony of Paul Harbaugh.)

business that was done during time pool was in effect and for year 1919 we pooled profits I received as my share for that period somewhere between \$3,000 and \$5,500, nearer the latter amount, but no cash credit.

I did receive interest in three other stores when I took over the Crown Jewelry Company. I gave Mr. Holsman notes, the consideration being \$2,500 and my other interest in his business I had interest in Keystone Jewelry Company, I sacrificed that. In taking over Crown Jewelry Company I assigned all my other interests and also paid him \$2,500 cash.

I had a verbal agreement with Mr. Holsman to pool the damages which might be received in damages due to the injunction. We were all pooling all our interest, various interests included, and each would have share agreed upon. I made no assignment in writing of interest of these damages to Mr. Holsman nor to Mr. Flatow. These damages were to be collected by me and distributed *pro rata* according to agreement. [129]

**Testimony of Mrs. Winifred Sullivan Minsky, for Defendant.**

MRS. WINIFRED SULLIVAN MINSKY was sworn as a witness examined and testified, on direct examination:

I live in Seattle, Washington. My name in 1919, beginning of that year was Winifred Sullivan, and

(Testimony of Mrs. Winifred Sullivan Minsky.)  
was engaged in the beginning of the year 1919 as a bookkeeper for the General Novelty Company, and had practically all charge of the accounts of the business, which are marked Defendant's Exhibit 2 in this hearing, and I recollect having seen these sheets fastened together.

They seem to be my handwriting except these three numbers and address under heading of M. Schultz; this is Mr. Harbaugh's writing (referring to three names entered in pencil on bottom of page headed M. Schultz) several others here under the original entries are mine.

We had blank forms which the agents would take on the road with them, which they filled with number of assortment and amount they would wish and send them back in to me and I would copy that on the card under the name of the purchaser, city, state and date and afterwards put them on these sheets, dates they were placed and the dates receipts were returned to me.

When this order came in of W. N. Crouch dated February 25th, 1919, signed by P. R. Enlow, agent, it was the first document on which I knew of the matter, and the notations which I made in that particular case were on this card also, Defendant's Exhibit 9 at this hearing. I then wrote on the sheet and then checked it here.

The card was just a duplicate record, we had the card and we had the sheet.

When I wrote down here with it was delivered from and I would write it on the sheet and then I



(Testimony of Mrs. Winifred Sullivan Minsky.)  
would check on the card so as to know I had already entered it on the sheet, and the card went into this card index from there, this Defendant's Exhibit 3. [130]

These cards were arranged according to the location of the dealer, according to city and state. As the amounts came in from this particular transaction of W. N. Crouch, they were entered by me on this card here and the amount entered here paid in full \$95.00. That appears on the sheet opposite to the one I just referred to, the left-hand sheet being identified by the name Paul Enloe. The source of my information, that that particular deal had been paid for was by receiving the check from which is made an entry immediately from that check or cash receipt on this paper marked Defendant's Exhibit 2 before the Master. I then made the entry in the journal.

We had a cash sheet where we entered everything that came in every day. I entered these items with respect to the W. N. Crouch sale on that cash sheet and then finally entries were made from this cash receipt into the journal and from the journal it was entered into the ledger. That was done at the end of every month. The amounts received from these different dealers who had these boxes were made direct to me and were entered on these sheets, defendant's exhibits before the Master, and I observed the same procedure with respect to every order I received.

In the accounts of Paul Enloe the entries on the

(Testimony of Mrs. Winifred Sullivan Minsky.)  
first and second sheets in my handwriting and every place where there is a different handwriting are as follows:

All these in ink on the sheet headed Paul Enloe are in my handwriting. The pencil writing is Mr. Harbaugh's. In the next account, Ben Levin, with the exception of the pencil figures on the first page of Ben Levin's account at the extreme right-hand, all the entries are in my handwriting. The next one is "Office." These are the orders that came into the office, and as the orders came in they were filled the same as the others and written up on the card and through the books the same as the other orders. In some cases they were renewals and in some original orders. All this [131] handwriting is mine with the exception of the figures on the right-hand column and this one address, "Raymond"—that is Mr. Harbaugh's writing. In the second two sheets marked "Office" the two addresses are in Mr. Harbaugh's handwriting, and the figures in the right-hand column of the first sheet are his, the rest is mine. On the third sheet marked "Office" the writing is mine with the exception of the figures on the right-hand column. On the fourth sheet the writing is mine with the exception of the figures in the right-hand column and with the exception of the address "Hood River." Except the name "L. S. Lindsay August 12" on the fifth sheet and the figures in the right-hand column the writing is mine, and the same for the sixth sheet.

(Testimony of Mrs. Winifred Sullivan Minsky.)

That takes in all the sheets headed "Office." The account of E. D. Gallahear is in my handwriting.

The account of Ernst Du Bussion is in my handwriting with the exception of one figure here in the right-hand column that is in pencil.

The account of George Leby, with the exception of the figures in the right-hand column it is mine. The amount of O. M. Babcock is my handwriting with the exception of the figures in the right-hand column. The account of Joseph Schnitzer is in my handwriting with the exception of the figures in the right-hand column. The account of M. Schulz is my handwriting with the exception of the three dates, February 11, March 1st and March 5th, A. B. Dawston, J. J. Granger, and Buckley & Delco with the addresses; they are in Mr. Harbaugh's handwriting. The year is not here, but I know, it was 1919.

The account of Ben Peckman is in my handwriting with the exception of one figure in the right-hand column. The account of E. Grubenstein is in my handwriting.

The money I paid out each day from the express receipts was under cash paid out and we kept a sheet for that, petty cash sheet. The express receipts, would be receipts by the express [132] company of receiving certain orders to be sent out.

Sometimes we would send three or four orders out at a time and they were paid and the amount marked on the petty cash sheet and the receipts we kept and filed away. By looking up these pages I

(Testimony of Mrs. Winifred Sullivan Minsky.)  
will be able to tell in each instance that the shipment was made as such on these records to the parties at their addresses as given of a certain assortment at a certain price, and so on.

When the commissions were paid to the different salesmen it was noted in the column headed "commission" to that man's account. I kept account of all money that came into the office of the General Novelty Company. The final postings of the amounts that I received in all the books were entered on the cards and in the journal also. I kept correct account of the expenses incurred in the office. The expenses paid out every day I entered on the petty cash sheet and they were entered at the end of the month in the journal and then in the ledger. The expenses paid out I put into the petty cash sheet then into the journal and in the ledger. I received my instructions in the business from Mr. Harbaugh.

#### Cross-examination.

The books of account or records I kept for the General Novelty Company consisted of the cards, the commission sheets or record sheets referring to Defendant's Exhibit 2, and the journal and the ledger, and the petty cash account. There was a check-book in the office for a while.

The entries were made on the same day as indicated by the dates and were made on the cards and then on to the record sheets.

The reason March 18th appears subsequent to April 22, in the account of Paul Enloe, Defendant's

(Testimony of Mrs. Winifred Sullivan Minsky.)

Exhibit 2, and being alongside the name Blaesing and Crouch is because Mr. Enloe was [133] on the road then and perhaps I did not get the order in until that date. This was in my hands before this one and still I would put it down March 18th because that was the day he sold it; that was the day he took the order.

As long as I had it on the card why it would not make any difference if it did not get checked on to the sheet. I may have written it three or four days later.

After an order is received and the shipment made there is no way of knowing how long it would take before the merchandise would be disposed of because sometimes they went off fast and other times slow.

I do not know if the injunction was in at that time; if the injunction was in at that time we did not ship that vender, Defendant's Exhibit 2.

I wrote letters to the dealers to turn in the venders after the injunction. I wrote the people to return the boxes as soon as they finished the merchandise, as soon as it run off. It took different times to run off one of these assortments, sometimes as long as a month, but it would not often take longer than a month.

It was always whenever I sent out an assortment whatsoever I would write to them and tell them as soon as it was run off to return the vender to us at our expense.

I believe I wrote letters after the injunction was



(Testimony of Mrs. Winifred Sullivan Minsky.)

served and told them to send in the venders and what was left, I am not positive. I can't recall if I did or not. I have a hazy recollection of something to that effect. We could not use that vender any more after the injunction was served. To send in the venders and the boards. Some sent some little in and some ignored the letters. Some sent neither the venders nor the boards and there is no record here showing what merchandise was returned.

I gave Flatow money in payment of his account or for some purpose \$300 in money and charged it up to Road Expense. It [134] was in the early spring, I think. The first entry I made of that payment was on the petty cash sheet, the money that was paid out like.

I left the office on January 22, 1920, and entered his employ about the latter part of January, 1919.

I made the entries in the ledger. Mr. Harbaugh usually told me how to enter them.

(Examination by the MASTER.)

Referring to these sheets, Defendant's Exhibit 2, before the Master, they were made in the usual course of business, and I kept these sheets while I worked there in the usual course of business.

Generally speaking, the entries were made as of the date they appear there, April 2d and April 22d and so on; they were put there the day we received the money.

These sheets or any part of them were not made by me from my independent records, for the pur-

(Testimony of Mrs. Winifred Sullivan Minsky.)  
pose of this suit or some other purpose, at or about the time I left the company, for this is the same book we had when we started to work there in February.

I had never kept books before. But I know the records here shown of amounts received, commissions paid, and so forth, that appear upon these sheets are true and correct accounts. That money was actually received and the commissions were actually paid at or on or about the date that they bear.

None of these venders, known as Defendant's Exhibit 2 in the District Court, were sent out after the issuance of the injunction.

We sent out the round or circular venders. I don't remember just when we sent them out first, but after the injunction we did not sent out any of the others. We just sent out these. [135]

#### Resuming Cross-examination.

Mr. Holsman had nothing whatever to do with the General Novelty Company when I worked there. I know definitely he had not because I knew Mr. Holsman very well and I know that I would know if he had had anything to do with this company, and he talked to me about his business matters lots of times.

I also know because I know that Mr. Harbaugh was the one that started the company and was the one that owned the company.

I account for the fact that in the I. Holsman account up to the time I left we had paid to Mr.

(Testimony of Mrs. Winifred Sullivan Minsky.)

Holsman \$5741.65 more than we owed him, more than we had received merchandise for, in that I believe Mr. Harbaugh borrowed some money from Mr. Holsman with which probably to start the venture.

He told me he was going to borrow some money from Mr. Holsman to get out a new vending machine. Mr. Harbaugh told me he was going to borrow some money from Mr. Holsman for the purpose of getting out another vending machine after the injunction.

#### Redirect Examination.

In the account of Paul Enloe the names on the sheet stating the delivery of the outfits, the boxes and merchandise, is, in some instances, opposite also the name and the date noted when the cash was received on that particular deal. There was an attempt made in the keeping of the cash receipts to try to keep the name of the party from whom the cash was received opposite the same name showing the output of the box.

We tried to keep where we placed the vender and when we received the cash right opposite on the next page. Sometimes we did and sometimes didn't, but we tried to keep it that way. When we placed the vender with E. F. Blaesing, which was January 23d, \$85, and on April 3d the next amount, and right opposite we tried to put when it was paid for.

[136]

That was the first paper on which I made my entry. I tried to be as careful as possible, making

(Testimony of Mrs. Winifred Sullivan Minsky.)  
my entries in each instance from the cash sheet. I was ill for a time, while working for Mr. Harbaugh. Some of the entries were made by Mr. Harbaugh for me while I was ill and some I made myself after I returned to work.

Referring to the entries on page 101 of the ledger, headed "Holsman, I. & Co." I really don't know of my own knowledge what these entries represent, so I can truthfully say that I do not know what all the items posted in this book mean. I might have known at the time but I cannot recall writing it now. I have seen these items before. They were made February 12, 15th and 28th.

**Testimony of Paul Harbaugh, in His Own Behalf  
(Recalled—Further Redirect Examination).**

Mr. HARBAUGH, on further redirect examination, testified:

I will explain my relationship with Mr. Holsman and how the payments were made. These payments were made according to the pool that I have referred to. Before that I received ten per cent of all the profits of the several businesses referred to, and the understanding was that was not only for the year 1919 but for the future years, and I received considerably more than I put in. I received not only the profits from the previous dates but also for the future. In all the concerns. I realized more money out of the pool than I would have out of the General Novelty Company.

(Testimony of Paul Harbaugh.)

I found my summary of total expenses was considerably less than shown on the ledger, Defendant's Exhibit 10, and that was due to the fact that I did not include all the expenses for the dates after the injunction was issued, merely computing the summary of commissions I took 15 per cent of the sums of money upon which a commission was to be paid, when in fact there were additional expenses, such as traveling expenses, etc., which I did not take [137] into account. That constitutes an error, that was all subsequent to the injunction. In other words, after the injunction and not before, and the figures should have been \$2,282.95, which would show a corresponding expense for the 45-day period, giving a figure of \$1,712.21, whereas in my summary I have shown an expense of \$1,978.19, an amount in excess rather than below that shown in the ledger.

In figuring the estimated business that I did during the period from February 24th to, approximately, the date of the injunction, in other words, the month preceding the injunction, I derived the figures from the salesmen's record sheets and from the ledger, the expense of carrying on the business.

On page 101 of the ledger, the account of I. Holsman & Co., shows balance December 31, 1919, and February 9 and February 10, 1920. The first one December 31st, shows a balance due me from I. Holsman & Co. The other items show payments to Mr. Holsman, I. Holsman & Co.



(Testimony of Paul Harbaugh.)

I never borrow any money from Mr. Holsman. These are payments to Mr. Holsman. She stated I talked about borrowing from him which she probably got from the fact that we were talking about getting credit for the merchandise.

This box, Defendant's Exhibit No. 2 in the District Court, is covered by a patent, and that is the patent which was introduced in the District Court. I am the owner of that patent and no one else has an interest in that patent.

#### Recross-examination.

I did not at any time turn over to Mr. Holsman all my interest in the General Novelty Company but pooled the profits of the General Novelty Company with his other businesses.

The profits that the General Novelty Company had made would be approximately \$5,747 that I had overpaid Holsman and I [138] also pooled any damages that I might receive from this case. Also there were a few accounts that had not been collected and that might be collected thereafter, small accounts.

#### **Testimony of J. F. Dwyer, for Defendant.**

Mr. DWYER, called as a witness by defendant, was sworn and testified on direct examination.

I am the plaintiff in this case.

In the trial in the court below I testified, and also mentioned in my complaint about the bringing of a suit against R. H. Enloe & Company, the suit being

(Testimony of J. F. Dwyer.)

based upon an alleged infringement of my patent.

The suit went to decree, being Case No. 8251, by consent of the defendant, the case being entitled "Joseph F. Dwyer versus R. H. Enloe & Company," and there was an agreement entered into which formed a part of the decree of record in that case.

I got damages out of that suit but I don't remember how much. I think this agreement here was the settlement of the previous infringement.

The document marked W. D. Phillips, Third and Main Streets, Vancouver, Washington, and opposite his name, \$105, [139] represents a shipment to this party, W. D. Phillips on consignment, to the amount of \$105, with the word "about" there, as you will note. Out of the box and the merchandise \$40.00 may be profit, but you must understand it entirely depends upon the gambling feature as to whether the box wins or loses. \$105 is the entire amount if every last ticket is sold.

\$105 would represent 3,000 tickets if sold at five cents each, which would total \$150, and thirty per cent to the dealer would amount to \$45.00, therefore the amount the document here uses "about" being always placed before it, is \$105. If every last ticket was sold it would be \$105.00, and each of these amounts assume such a transaction.

In that respect transactions as they are put on this agreement of the amount and value of the box shipped, the deductions made by the dealer, and the gross profit which would be turned into me providing every ticket had been sold, agree with the com-

(Testimony of J. F. Dwyer.)

putation made by Mr. Harbaugh on like transactions. And that is the same method as used by Mr. Harbaugh.

If they do not sell all the merchandise, the merchandise that is not sold, the tickets not sold plus five cents for each ticket that is sold, less the commissions on each is the amount returned.

### Cross-examination.

There is no certainty as to the amounts received. The shipment is made and 3,000 tickets go with every one of these instances we have discussed. The tickets sell at five cents each bring in \$150 if they are all sold. As a matter of fact, they are not all sold, because there is one feature prize or maybe two, and just as soon as the big prizes are gone the boxes are returned, they cannot sell any more and credit is given for the unsold merchandise and tickets and a new outfit shipped to the customer. That is one point. Another point is continually the amount of police interference. In my business we had that always to contend with, [140] so I brought an action to decide whether these devices were gambling devices or not, whether it was contrary to the statutes. I brought an injunction against the city of Seattle; it was allowed in the Superior Court and the city took it up on appeal and the Supreme Court declared it a gambling device, and that was the end of all the business we had ever had with the silent salesman.

It also depends upon the sporting instincts of the people who play this device. It also depends upon

(Testimony of J. F. Dwyer.)

the business condition of the vicinity and the business getting ability of the dealer where this device is placed. It also depends upon the general business conditions, whether the town is so called open, or closed, whether the fellows in the town have to patronize pool-halls and card-rooms or not, and where the device is placed in the town. In other words whether they have the money to take a chance.

There is no certainty about the time it takes to get the returns from the sale. In our business that is entirely indefinite we figure our business entirely on the time when we get the receipts, dependent entirely on the conditions explained. We do not consider any business done when the goods are shipped. We figure the business done when we get the money because that is the only time we can tell how much we are going to receive. When the Supreme Court of the State of Washington declared this device a gambling device that ended my business. And the Silent Salesman is in all respects similar to the device used by the defendant in this case, Exhibit No. 2. That is the one I sought to enjoin. In the State of Oregon we used the words "Bargain Boxes" for the title of the device and in the State of Washington the name of the device is the silent salesman.

#### Redirect Examination.

The Supreme Court decision was long after the trial of this case, and up to the time of the trial of this case, October, [141] 1920, I was still in business just as usual as theretofore, and I was subject

(Testimony of J. F. Dwyer.)

to the same police interference. Notwithstanding police and other conditions I did quite a profitable business. When I had interference in one place by the police I immediately went into another. I had a large territory to go into and taking it as a whole the business was a profitable one.

Recross-examination.

The profits were not susceptible of determination in advance with any reasonable degree of certainty.

Respectfully submitted,

T. J. GEISLER,

Attorney for Defendant, Harbaugh. [142]

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(Title.)

**Stipulation Re Statement of Evidence.**

It is hereby stipulated by the parties that the foregoing statement of evidence submitted on the part of defendant on appeal of the above-entitled cause, and duly lodged in the office of the Clerk of this Court, is correct, complete and properly prepared, and may be approved by the Court as a part of the record in said cause for the purpose of appeal.

Dated: Nov. 2, 1922.

E. L. SKEEL,

ROBERTS & SKEEL,

Attorneys for Plaintiff.

T. J. GEISLER,

Attorney for Defendants. [143]



(Title.)

**Order Approving Statement of Evidence.**

Pursuant to the stipulation of the parties in the above-entitled cause on appeal:

The statement of the evidence (and all the exhibits therewith included) lodged by appellant, Paul C. Harbaugh, in this cause of appeal, is hereby approved as true, complete and properly prepared, and the same shall constitute a part of the record in this cause for the purpose of said appeal.

Dated: Nov. 6, 1922.

R. S. BEAN,  
District Judge. [144]

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On November 21, 1922, an order was filed to send the original exhibits of this cause to the Court of Appeals.

(Title.)

**Order to Send to the United States Circuit Court of Appeals for the Ninth Circuit the Original Exhibits.**

On the application of T. J. Geisler, of counsel for the above-named Paul Harbaugh, defendant

It is hereby ORDERED that the original models and exhibits introduced by either party at the trial of this cause in the court, or before the Master thereof, be sent by the Clerk of this Court to the Marshal of the Circuit Court of Appeals for the

Ninth Circuit, pursuant to Rule 34 of the latter court.

Dated: Nov. 21, 1922.

R. S. BEAN,  
Judge. [145]

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United States of America,  
District of Oregon,—ss.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from two to one hundred and forty-five, inclusive, constitute the transcript of record on appeal in the case in said court, wherein Joseph F. Dwyer is plaintiff and appellee and I. Holsman, I. Holsman & Co., John Doe Rubenstein, Paul Harbaugh, Ben Levin, Jane Doe Sullivan, General Novelty Co., John Doe, Richard Roe and Robert Roe are defendants, and the said defendant Paul Harbaugh is appellant; that said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant, and is a true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

And I further certify that I return to the United States Circuit Court of Appeals for the Ninth Circuit with the said transcript of record attached

thereto, the original citation on appeal filed in said cause.

I further certify that the cost of the foregoing transcript is \$42.85, and that the same has been paid by the said appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 28th day of November, 1922.

[Seal]

G. H. MARSH,

Clerk. [146]

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[Endorsed]: No. 3946. United States Circuit Court of Appeals for the Ninth Circuit. Paul Harbaugh, Appellant, vs. Joseph F. Dwyer, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed December 4, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. 8369.

JOSEPH F. DWYER,

Plaintiff,

vs.

I. HOLSMAN, I. HOLSMAN & CO., JOHN DOE  
RUBENSTEIN, PAUL C. HARBAUGH,  
BEN LEVIN, JANE DOE SULLIVAN,  
GENERAL NOVELTY CO., JOHN DOE,  
and RICHARD ROE,

Defendants.

**Order Extending Time to and Including October  
15, 1922, to File Record and Docket Cause.**

On the application of T. J. Geisler, of counsel for  
defendant, Paul Harbaugh, it is ordered that the  
defendants be, and are hereby allowed to and in-  
cluding the 15th day of October, 1922, in which to  
file a transcript of the record herein, with the  
United States Circuit Court of Appeals for the  
Ninth Circuit.

Dated the 9th day of Sept., 1922.

WM. B. GILBERT,  
Circuit Judge.

[Endorsed]: No. 8369. In the District Court  
of the United States for the District of Oregon.  
Joseph F. Dwyer, Plaintiff, vs. I. Holsman, I. Hols-  
man & Co., John Doe Rubenstein, Paul C. Har-  
baugh, Ben Levin, Jane Doe Sullivan, General

Novelty Co., John Doe, and Richard Roe, Defendants. Order Extending Time for Filing Transcript of Record on Appeal.

No. 3946. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including October 15, 1922, to File Record and Docket Cause. Filed Sept. 11, 1922. F. D. Monckton, Clerk. Refiled Dec. 4, 1922. F. D. Monckton, Clerk.

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In the United States District Court for the District of Oregon.

No. 8369.

JOSEPH F. DWYER,

Plaintiff,

vs.

I. HOLSMAN, I. HOLSMAN & CO., JOHN DOE  
RUBENSTEIN, PAUL C. HARBAUGH,  
BEN LEVIN, JANE DOE SULLIVAN,  
GENERAL NOVELTY CO., JOHN DOE,  
and RICHARD ROE,

Defendants.

**Stipulation and Order Extending Time to and Including November 15, 1922, to File Record and Docket Cause.**

It is hereby stipulated that the defendant's time to file a transcript of record herein with the United States Circuit Court of Appeals for the Ninth Cir-



cuit be extended to and including the 15th day of November, 1922.

Dated: October 13, 1922.

ROBERTS & SKEEL,  
FRANK A. STEELE,  
Attorneys for Plaintiff.  
T. J. GEISLER,  
Attorney for Defendant.

### ORDER

On the foregoing stipulation, it is on application of T. J. Geisler, of counsel for defendant Paul Harbaugh,—

ORDERED that the defendants be, and are hereby allowed to and including the 15th day of November, 1922, in which to file a transcript of the record herein with the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: October 13, 1922.

R. S. BEAN,  
Judge.

[Endorsed]: No. 8369. In the United States District Court for the District of Oregon Joseph F. Dwyer, Plaintiff, vs. I. Holsman, I. Holsman & Co., John Doe Rubenstein, Paul C. Harbaugh, Ben Levin, and Jane Doe Sullivan, General Novelty Co., John Doe, and Richard Roe, Defendants. Order Extending Time for Filing Transcript of Record on Appeal.

No. 3946. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including

November 15, 1922, to File Record and Docket Cause. Filed Oct. 16, 1922. F. D. Monckton, Clerk. Refiled Dec. 4, 1922. F. D. Monckton, Clerk.

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In the District Court of the United States for the  
District of Oregon.

November 13, 1922.

JOSEPH F. DWYER,

vs.

I. HOLSMAN et al.

**Order Extending Time to and Including December  
1, 1922, to File Record and Docket Cause.**

Now at this day, for good cause shown, it is

ORDERED, that the time for filing the transcript of record for appeal in this cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including December 1, 1922.

R. S. BEAN,  
Judge.

[Endorsed]: No. 3946. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including December 1, 1922, to File Record and Docket Cause. Filed Dec. 1, 1922. F. D. Monckton, Clerk.

In the District Court of the United States for the  
District of Oregon.

No. E—8369.

November 28, 1922.

I. HOLSMAN

vs.

PAUL HARBAUGH et al.

**Order Extending Time to and Including December  
9, 1922, to File Record and Docket Cause.**

Now at this day, for good cause shown, it is  
ORDERED, that the time for filing the transcript  
of record in this cause and docketing the same in  
the United States Circuit Court of Appeals for the  
Ninth Circuit be, and the same is hereby, extended  
to and including December 9, 1922.

R. S. BEAN,  
Judge.

[Endorsed]: No. 3946. United States Circuit  
Court of Appeals for the Ninth Circuit. Order  
Under Subdivision 1 of Rule 16 Enlarging Time to  
and Including December 9, 1922, to File Record and  
Docket Cause. Filed Dec. 4, 1922. F. D. Monck-  
ton, Clerk.